



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 200/2014

In the matter between:

PREMIER CONSTRUCTION CC**APPLICANT**

And

**CHAIRPERSON OF THE TENDER COMMITTEE
OF THE NAMIBIA POWER CORPORATION
BOARD OF DIRECTORS****FIRST RESPONDENT****CHAIRPERSON OF THE NAMIBIA POWER
CORPORATION BOARD OF DIRECTORS****SECOND RESPONDENT****NAMIBIA POWER CORPORATION (PTY) LTD****THIRD RESPONDENT****AMA ENGINEERING AND CONSTRUCTION CC****FOURTH RESPONDENT****EMIRATES TRADING CC****FIFTH RESPONDENT**

Neutral citation: *Premier Construction CC v Chairperson of the Tender Committee of the Namibia Power Corporation Board of Directors (A 200/2014) [2014] NAHCMD 270 (17 September 2014)*

Coram: PARKER AJ**Heard:** 22 August 2014**Delivered:** 17 September 2014

Flynote: Practice – Applications and motions – Interim relief pending review application – In review application applicant alleging violation of art 18 in relation to it – In instant application applicant alleging ‘prima facie infringement of applicant’s rights’ – Court held that it is a constitutional imperative under the Namibian Constitution that onus of proof on applicant who alleges violation of his or her

constitutional basic human rights – And proof should be conclusive proof – Court held further that third respondent bears no onus of proof – Consequently, court concluded that to ask the court to accept that there has been prima facie infringement until proved otherwise has the effect of setting at naught without justification the constitutional imperative that onus of proof lies on party alleging infringement of fundamental rights – Court concluded further that if court granted the interim relief on the basis that there has been prima facie infringement of the applicant's rights that would be wrong and unjust – Court found that on the papers it is rather the fourth respondent who will suffer real loss or disadvantage if the interim relief was granted – Based on these reasons court rejected applicant's prayer for interim relief with costs.

Summary: Practice – Applications and motions – Interim relief pending review application – Applicant sought interim relief (as opposed to interim interdict) pending review application to review and set aside third respondent's decision to award tender to fourth respondent – In review application applicant alleges infringement of its art 18 (of the Namibian Constitution) right – Court held that to ask the court to accept that there has been prima facie infringement until proved otherwise has the effect of setting at naught without justification the constitutional imperative that onus of proof lies on party alleging infringement of fundamental rights – Court concluded that if court granted the interim relief on the basis that there has been prima facie infringement of the applicant's rights that would be wrong and unjust – Court found that on the papers the event which applicant has approached the court to stop has already been implemented because contract between third respondent (the employer) and fourth respondent to whom the tender was awarded had been entered into – Tender works were in progress after fourth respondent acquired construction machinery and equipment for the works – Court found further that fourth respondent had concluded contracts with subcontractors and committed most of its employees to the works – Based on the issue of constitutional imperative and the factual findings court refused to grant the relief – Consequently, court rejected the application with costs.

That the application (in Part B of the notice of motion) is dismissed with costs, including costs of one instructing counsel and two instructed counsel in respect of the first, second and third respondents.

JUDGMENT

PARKER AJ:

[1] I cannot do any better than to prefix this judgement with the words I stated in *New Era Investment v Roads Authority and Others* 2014 (2) NR 596, para 1: 'Once more, the court is confronted with a matter in which a person who has failed to win a tender to supply goods or do work has dragged the employer to court, (and with the employer the person who won the tender as well as those who did not'. It would seem that it has now become quotidian in Namibia that those who take upon themselves to tender for work and for the supply of goods and services have learnt how to compete but have not learnt how lose. I hasten to add that far be from it for me to suggest that just because a person has won so many tenders from the same employer in the past, like the present applicant, that person cannot seek judicial redress if aggrieved by the latest decision denying him a tender. It is that person's unbridled right to complain and seek redress.

[2] The burden of the court in the instant proceeding is to determine Part B of the notice of motion. The applicant failed to win a tender, ie Tender No. NPWR/2014/23, offered by the third respondent (the employer). The third respondent awarded the tender to the fourth respondent. Thus, in this matter, the applicant, represented by Mr Corbett SC, assisted by Mr Maasdorp, has brought this application by notice of motion, marked 'B', for an order in the following terms:

- '1. Dispensing with full and proper compliance with the Rules relating to service and time limits as set out in Rule 73(3) of the Rules of this Honourable Court, by reason of the urgency of the matter.
2. Ordering the relief sought in paragraphs 1 to 2 in Part A above, to operate as interim orders pending the final determination of the review application.
3. Pending the final determination of the review application, interdicting and restraining the first to third respondents from in any manner:
 - 3.1 implementing or giving effect to the decision taken on or about 8 July 2014 under Tender No. NPWR/2014/23;
 - 3.2 in any manner concluding an agreement(s) with the fourth respondent pursuant to the decision referred to in paragraph 3.1 above; and
 - 3.3 giving effect to any agreement(s) referred to in paragraph 3.2 above, should the first to third respondents and the fourth respondent have already entered into such agreement(s).
4. In the event of opposition to this Part B, ordering the first, second and third respondents to pay the applicant's costs jointly and severally, the one paying the others to be absolved, alternatively, that those respondents opposing the application pay the applicant's costs jointly and severally, the one paying the others to be absolved.
5. Granting further and/or alternative relief to the applicant.'

[3] In Part A of the notice of motion, referred to in para 2, above, the applicant seeks an order in the following orders:

- '1. Calling upon the first respondent, alternatively the second respondent to show cause why:
 - 1.1 the purported decision taken by the first respondent, alternatively the second respondent, on or about 8 July 2014 to the effect that the fourth

respondent be awarded Tender No. NPWR/2014/23 entitled: KUNENE Substation: Construction of Terrace, Roads and Related Civil Works should not be reviewed and set aside in terms of Rule 76(1); and

- 1.2 the decision referred to in paragraph 1.1 above, should not be declared to be in conflict with Article 18 of the Namibian Constitution.
2. Declaring invalid, alternatively setting aside, any agreement(s) concluded between either of the first to third respondents, on the one hand, and the fourth respondent pursuant to the award of the tender aforesaid on or about 8 July 2014.
3. Ordering the first respondent, the second respondent and the third respondent, and any other such respondents who might oppose the relief sought in this application, to pay the applicant's costs jointly and severally, the one paying the others to be absolved.
4. Granting further and/or alternative relief to the applicant.'

[4] Part A, as I have said, is not the burden of this court in the present proceeding; Part B is. The first respondent, second respondent and third respondent have moved to reject the application, and they are represented by Mr Hinda SC, assisted by Mr Narib. The fourth respondent, too, has done likewise, and it is represented by Mr Namandje. From the founding affidavit I gather that the applicant does not seek any relief against the fifth respondent. In any case, the fifth respondent has not filed any papers.

[5] In his heads of argument, Mr Corbett explains that the nature of relief sought is not interdictory relief, but urgent interim relief pending the review application, and it is aimed at preventing the implementation of 'the illegalities sought to be challenged in terms of the review application and to prevent the perpetuation of those illegalities until the court finally decides the matter in the main review application'. And citing authorities in support of his argument, Mr Corbett sets out two requisites which the applicant should fulfil to be successful, namely, (a) a 'prima facie infringement of the applicant's rights' and (b) 'urgency or a real loss or disadvantage to be suffered if the

applicant is compelled to rely solely on the normal procedure for bringing its dispute to court'. I shall consider requisite (b) first because it requires no extensive treatment.

[6] The applicant prayed the court to treat the application as an urgent application. The respondents did not challenge the urgency of the matter. In any case, the hearing of the matter was postponed from 19 August to 21 August 2014 to enable the respondents to file answering papers. This disposes of requisite (b), as well as para 1 of the notice of motion. I should proceed to consider requisite (a) which relates primarily to para 3 of the notice of motion.

[7] As respects para 3 of the notice of motion; the first issue is this: Has the respondents been properly cited? The respondents contend that they have not. I agree with the respondents. The applicant is not of two minds as to who the first respondent, the second respondent or the third respondent is. The applicant relies on art 18 of the Namibian Constitution for the review application (Part A of the notice of motion). In that event, if art 18 of the Constitution is read with rule 76 of the rules of court, it is clear that the first respondent is an administrative official, so is the second respondent, and the third respondent is an administrative body within the meaning of art 18 of the Namibian Constitution. But it cannot seriously be argued that the decision sought to be reviewed and set aside is that of the first respondent or second respondent. Doubtless, it is that of the third respondent.

[8] It is inexplicable why the first and second respondents have been joined as parties at all. In this regard, for Mr Hinda there is no good reason why they have been joined and for such misjoinder of parties the notice of motion is doomed to fail unless it is amended. I accept Mr Hinda's submission because it is sound. In all this it is worth noting that it is critical that a party who desires to bring an application to review and set aside a decision of an administrative body or an administrative official must be clear in his or her own mind which administrative body or administrative official he or she is dragging to court. I have said previously that on the facts it can only be the decision of the third respondent that may be reviewed and set aside. The first respondent is the chairperson of a committee of the third respondent; and, in

that case, the committee could have played recommendary role only in the award of the tender. And as to the second respondent; she is an administrative official, but she could not have taken the decision as to whom the third respondent should award the tender.

[9] In my opinion, where a party who prays the court to review and set aside the decision of administrative body or an administrative official is not clear in its own mind whose decision it has approached the court to review and set aside, there should be fatal consequences for such party. In the present proceeding and at this juncture I should say that such fatal consequence (I shall refer to others in due cause) is this. As the papers stand, the review application is doomed to fail for the reasons I have given previously. It cannot even begin to take off from the starting blocks. The result would undoubtedly be this. There would be only a defective application filed with the court. But nothing could come out of such defective application: *ex nihilo nihil fit*. The result, I should say, would be that in effect there would be no proper review application pending whose finalization the interim relief is sought in the instant proceeding. For these reasons and conclusions, I hold that it would be unjust, unfair and unreasonable to grant the relief sought in para 3 of the notice of motion. If these reasons and conclusions ('the first set of reasons and conclusions') are not cogent enough upon which to reject the application, I proceed further.

[10] The first set of reasons and conclusions take me to Mr Corbett's submission, referred to previously, namely that there are two requisites which an applicant should satisfy in order for the applicant to be successful in the remedy Mr Corbett characterizes as 'urgent interim relief' which, according to counsel, stands in contradistinction to interdictory relief. I now proceed to consider requisite (a) which is: 'A prima facie infringement of the applicant's rights'.

[11] I note that the words 'prima facie' have been used as an adjective to qualify the noun 'infringement'. And looking at the context in which the words have been used, I understand the requisite to mean this: The applicant, in the instant proceeding, should only establish that at first sight the applicant's rights have been

infringed and the court should accept it to be so until proved otherwise; that is, until the third respondent proves otherwise. (See *Concise Oxford English Dictionary*, 11th ed; Bryan A Garner, *A Dictionary of Modern Legal Usage*, 2nd ed; V G Hiemstra and H L Gonin, *Trilingual Legal Dictionary*, 7th ed.) But the third respondent bears no onus of proof. Onus of proof lies on the party alleging infringement or threatened infringement of fundamental rights. (*Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC)). Thus, in the instant case, if the court were to accept that the applicant's rights have been violated until proved otherwise, and solely on that basis restrain the third respondent from implementing its decision, when the third respondent bears no onus of proof at this stage or at any other stage, that would be wrong and unjust. In this regard, it is important to note that in *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377, which counsel referred to the court, the court found that the respondent there acknowledged that the applicant's rights were violated. That is not the case in the instant proceeding. Besides, in *Kaulinge* the applicant sought interim interdict, and in that event the applicant was obliged to satisfy the requisites set out at 387E-F in order to succeed. But Mainga J stated that he was 'not convinced that even where the applicant had not met the requisites of an interim interdict, under the circumstances she should be denied the relief sought'.

[12] Mainga J did not, in my opinion, create any principle of law or rule of practice unconnected to the relief of interim interdict. The learned judge's view was influenced by the prevailing circumstances of the case before him when deciding whether to exercise his discretion in favour of granting the relief of interim interdict. Indeed, I do not read *Kaulinge* as creating any relief other than interdictory relief. The learned judge was undoubtedly considering the relief of interim interdict.

[13] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A), which the court in both *Kaulinge* and *Esterhuizen v Chief Registrar of the High Court* 2011 (1) NR 125 cited with approval should be applied in the instant proceeding against Namibia's constitutional imperatives, eg the imperative that onus of proof – ie conclusive proof – lies on the party alleging infringement or threatened infringement of fundamental rights. In this regard, and as a last word, I should underline this. One should not lose sight of the fact that

reference to 'rights' in the *Safcor* judgement could never have been a reference to fundamental rights or basic human rights of which art 18 rights are part of. Basic human rights were in 1982 alien to the State and society of South Africa. These observations are significant; not least because the approach in the interpretation and application of basic human rights is far removed from the approach in the interpretation and application of legal rights. The two sets of rights should always be kept apart: they have deep, uncompromising jurisprudential differences. In sum, the relief sought by the applicant upon reliance of art 18 of the Namibian Constitution has the effect of setting at naught the aforementioned constitutional imperative without justification. Therefore, as I have said previously, if the court were to grant the interim relief sought in para 3 of the notice of motion on the basis that there has been a 'prima facie infringement of the applicant's rights' (ie under art 18 of the Namibian Constitution), that would be wrong and unjust.

[14] If these reasons and conclusions ('the second set of reasons and conclusions'), too, are not compelling enough upon which to reject the application, I proceed to another plane.

[15] On the papers, I make the following factual findings. The implementation of the tender, which the applicant prays the court to stop has already begun. A contract between the employer (the third respondent) and the fourth respondent for the implementation of the tender was concluded on or about 10 July 2014. Moreover, site for the carrying out of works was handed over to the fourth respondent on 6 August 2014 and work is in progress. Additionally and crucially, the period within which the tender works must be completed is less than three months; that is three months from 6 August 2014.

[16] Furthermore, in pursuant of carrying out the tender works, the fourth respondent has entered into contracts for the purchase and supply of several types of machinery and equipment necessary and required for the performance of the tender works. Moreover, the fourth respondent has entered into contracts with subcontractors who are already providing their service, and, further, it has committed most of its employees to the carrying out of the tender works. Moreover, the fourth

respondent has entered into financial arrangements with Banks to give some assistance to the financial outlays of the works. To show outcomes, the fourth respondent has submitted a weekly report, indicating progress of work done, to the third respondent.

[17] Based on these factual findings, I conclude that it is rather the fourth respondent who will suffer real loss or disadvantage (to use the words of Corbett, JA in *Safcor Forwarding (Johannesburg) (Pty) Ltd* at 674H), if the relief sought in para 3 of the notice of motion (Part B) was granted the applicant. These are the third set of reasons and conclusions.

[18] Having taken into account the three sets of reasons and conclusions, I refuse to grant the relief sought in para 3 of the notice of motion (Part B). I now proceed to consider the relief sought in para 2 of the notice of motion (Part B).

[19] In para 2 of the notice of motion the applicant seeks an order whereby 'the relief sought in paragraphs 1 to 2 in Part A above (is) to operate as interim orders pending the final determination of the review application'. I respectfully refuse to grant this order. To start with; the burden of this court in the instant proceeding is to determine the application under Part B of the notice of motion. As Mr Hinda submitted, the applicant does not point to any rule of practice that the court may apply in the determination of the relief prayed for in para 2 of the notice of motion. In my judgement this relief should also fail, and it fails and is rejected.

[20] Based on one or all of the three sets of reasons and conclusions, the application (in Part B of the notice of motion) is dismissed with costs, including costs of one instructing counsel and two instructed counsel in respect of the first, second and third respondents.

11
11
11
11
11

C Parker
Acting Judge

