REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 236/2015

In the matter between:

INTER-AFRICA SECURITY SERVICES CC	**1ST APPLICANT**
TRIPLE ONE INVESTMENT CC	**2ND APPLICANT**

And

TRANSNAMIB HOLDINGS LIMITED	**1ST RESPONDENT**
THE CHAIRPERSON OF THE TRANSNAMIB TENDER COMMITTEE	**2ND RESPONDENT**
INDEPENDENT SECURITY SERVICES	**3RD RESPONDENT**
NKASA SECURITY SERVICES	**4TH RESPONDENT**
SPLASH INVESTMENT	**5TH RESPONDENT**
CIS SECURITY SERVICES	**6TH RESPONDENT**
SHILIMELA SECURITY SERVICES	**7TH RESPONDENT**
NAMIBIA PROTECTION SERVICES	**8TH RESPONDENT**
RUBICON SECURITY SERVICES	**9TH RESPONDENT**
SECURITY TRAINING COLLEGE OF NAMIBIA	**10TH RESPONDENT**
OMBALA TRADING ENTERPRISES	**11TH RESPONDENT**
STEFMORY INVESTMENT	**12TH RESPONDENT**
MAXI SECURITY ENTERPRISES	**13TH RESPONDENT**
ONE AFRICA INVESTMENT CC	**14TH RESPONDENT**
SIRIVA INVESTMENT CC	**15TH RESPONDENT**
AMON SECURITY SERVICES	**16TH RESPONDENT**
SITANA CONSTRUCTION	**17TH RESPONDENT**

DIBASEN TRADING ENTERPRISE	**18TH RESPONDENT**
NAMIBIA PEOPLES PROTECTION	**19TH RESPONDENT**
SHANIKA PROTECTION	**20TH RESPONDENT**
LION PROTECTION SERVICES	**21ST RESPONDENT**
WAAKALI SECURITY SERVICES	**22ND RESPONDENT**
SHINE CONSULTANT SERVICES	**23RD RESPONDENT**
BAOBAB SECURITY SERVICES	**24TH RESPONDENT**
TIGER SECURITY SERVICES	**25TH RESPONDENT**
SOUTHERN SECURITY	**26TH RESPONDENT**
NGATUKONDJE TRADING	**27TH RESPONDENT**
LUKROSE INVESTMENT CC	**28TH RESPONDENT**
WINDHOEK SECURITY SERVICES	**29TH RESPONDENT**
ROYAL SECURITY SERVICES	**30TH RESPONDENT**
SHIMWE TRADING ENTERPRISES	**31ST RESPONDENT**
WETU MULTI INVESTMENT	**32ND RESPONDENT**
RENDORA COMMERCIAL ENTERPRISES	**33RD RESPONDENT**
LC INVESTMENT	**34TH RESPONDENT**
KEETMANS LION FORCE SECURITY	**35TH RESPONDENT**
KATIMBO SECURITY SERVICES	**36TH RESPONDENT**
ONYEKA PROTECTION SERVICES	**37TH RESPONDENT**
NSS	**38TH RESPONDENT**
CHISUMA MULTI SERVICES	**39TH RESPONDENT**
OMLE SECURITY SERVICES	**40TH RESPONDENT**
URAN SECURITY SERVICES	**41ST RESPONDENT**
OTAMANZI SECURITY SERVICES	**42ND RESPONDENT**
GM SECURITY SERVICES	**43RD RESPONDENT**
CHIPPA TRADING ENTERPRISES	**44TH RESPONDENT**
CHOBE SECURITY	**45TH RESPONDENT**
JJJ TRADING ENTERPRISES	**46TH RESPONDENT**
MVINGU SECURITY SERVICES	**47TH RESPONDENT**
THATO CONSTRUCTION	**48TH RESPONDENT**
MAYFIELD PROTECTION SERVICES	**49TH RESPONDENT**

IIPUMBU INVESTMENT SERVICES **50TH RESPONDENT**
ONAMAPONGWA TRADING ENTERPRISES **51ST RESPONDENT**
KHAIBASEN SECURITY SERVICES **52ND RESPONDENT**

Neutral citation: *Inter-Africa Security Services CC v Transnamib Holdings Limited* (A 236-2015) [2015] NAHCMD 276 (17 November 2015)

Coram: PARKER AJ

Heard: **28 October 2015**
Delivered: **17 November 2015**

Flynote: Applications and motions – Urgency – Requirements for prescribed by rule 73(4)*(a)* and *(b)* of the rules of court – Applicant must set out explicitly the circumstances relating to urgency and reasons why the applicants claim they could not be afforded substantial redress in due course – 'Substantial redress' not synonymous with 'damages' – And applicant must make out a case for urgency in founding affidavit – No urgency where urgency is self created – Respondent bears no onus, none at all, to establish the opposite, namely, that the matter should not be heard on the basis of urgency – Respondent only need to answer to applicant's averments that the application be heard as a matter of urgency.

Summary: Applications and motions – Urgency – Requirements for prescribed by rule 73(4) of the rules of court – Applicant must set out explicitly the circumstances relating to urgency and reasons why the applicants claim they could not be afforded substantial redress in due course – 'Substantial redress' not synonymous with 'damages' – And applicant must make out a case for urgency in founding affidavit – No urgency where urgency is self created – Court found that the applicants failed to satisfy the requirements for urgency prescribed by rule 73(4) of the rules – Court found further that urgency was self created – Applicants had been aggrieved by decision of first respondent in July 2015 but only approached the court for relief on

urgent basis in September 2015 without justification – Consequently, court refused application on the basis that the requirements in rule 73(4) have not been met.

ORDER

The application is refused, on the basis that the requirements of rule 73(4) of the rules have not been met, with costs, including costs of one instructing counsel and one instructed counsel in respect of the first and second respondents and in respect of the third respondent, respectively.

JUDGMENT

PARKER AJ:

[1] Once more the court is confronted with an application on tender; this time, tender to do work, that is, the supply of security service for an employer, the first respondent. The applicants are represented by Mr Namandje (with him Ms Feris), the first and second respondents by Mr Obbes, and the third respondent by Mr Mouton.

[2] The applicant prays the court to hear the application on the basis of urgency. The first, second and third respondents have moved to reject the application, and have raised a preliminary objection to the applicants' prayer that the matter be heard on urgent basis. Mr Obbes and Mr Mouton ask the court to determine the issue of urgency at the threshold before all else. I have to oblige. After all, it is a point *in limine*; and so, it is to the issue of urgency that I now direct the inquiry.

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[3] Our law on the practice of urgent application in terms of rule 73(4) of the rules of court (rule 6(12)*(b)* in the repealed rules) is well entrenched, as Mr Namandje submitted. On the rule, I had this to say in *Diergaardt v The Magistrate: Magisterial District of Gobabis* (A 231/2013) [2013] NAHCMD 231 (1 August 2013) (Unreported), para 6:

'It has been well settled since *Salt and Another v Smith* 1990 NR 87, which interpreted and applied rule 6(12)*(b)* of the rules of court, that rule 6(12)*(b)* entails two requirements; and for an applicant to succeed in persuading the court to grant the indulgence sought for the matter to be heard on urgent basis the applicant must satisfy both requirements. The two requirements are (a) the circumstances relating to urgency which have to be explicitly set out, and (b) the reasons why the applicant could not be afforded substantial redress in due course. It is also well settled that where urgency is self created the court will refuse to grant the indulgence that the matter be heard on urgent basis (*Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48).'

[4] Rule 6(12)*(b)* is now repealed, and the provisions contained therein are rehearsed in rule 73(4) of the rules of court. It need hardly saying that the two requirements must all be satisfied together by an applicant because they are intrinsically intertwined. The width of the wording of the rule compels this conclusion; and what is more, the applicant must make out a case in the founding affidavit to justify the grant of the indulgence that the application be heard as a matter of urgency. (*Salt and Another v Smith*) See also the high authority of the Supreme Court, per Strydom AJA, in the case of *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC) which Mr Obbes referred to the court.

[5] In this regard I hold that a respondent bears no onus – none at all – to establish the opposite, namely, that the matter should not be heard on the basis of urgency. A respondent only need to answer to the applicant's averments that the application should be heard as matter of urgency. For this reason, I put no currency on Mr Namandje's submission that paras 23, 24, 25 and 26 in the answering affidavit are inconsistent. Whether they are or they are not is of no moment in the

determination as to whether the applicant has satisfied the peremptory requirements of rule 73(4) in the answering affidavit.

[6] The applicants have set out in paras 79 to 86 what they consider to be circumstances relating to urgency which, in their view, are explicitly set out, and the reasons why they claim they could not be afforded substantial redress in due course, which in their view are also explicitly set out. I proceed to consider those paragraphs. As I see it, only in para 83 that the applicants make a weak and unsatisfactory attempt to satisfy the second part of the requirements on urgency; and I shall consider it in due course.

[7] There is no merit in these grounds tending to set out explicitly circumstances relating to urgency. On the papers the conclusion is inescapable that the applicants say they have been aggrieved since at least 29 July 2015 by the first decision not award the tender to them. They have, therefore, known since at least that date that 'any award in this matter is massively tainted because of a number of grounds', as they themselves aver. It is, therefore, safe to hold that the applicants had grounds already in their bossoms to challenge the tender not being awarded to them; otherwise, they would not make such a statement on oath. With such knowledge they chose not to take steps to get redress in the court. And not that they did not know what to do. They stated on oath that '[t]he process will therefore be liable to be reviewed and aside in the High Court'.

[8] On 29 July 2015 the applicants, through their legal representatives, wrote to the first respondent for 'full reasons' why their bids were unsuccessful and 'full reasons' why some bidders were successful. The first respondent was requested to provide the 'full reasons on or before the 5th of August 2015'. What follows is significant for our present purposes.

[9] The response of the first respondent to the 29 July 2015 letter was a letter dated 4 August 2015; and it did not contain 'the full reasons' the applicants had requested from the first respondent. In fact, not only did the 4 August 2015 letter not

give to the applicants what they had asked for, but the letter also informed the applicants in no uncertain terms that ‘as a temporary measure, we have engaged the successful bidders to commence with the provision of services’. Thus, by its letter of 4 August 2015, the first respondent called the applicants’ bluff, to use a pedestrian language.

[10] Indeed, that was the time when any reasonable applicant, who has legal advice at his or her disposal and who was desirous of protecting his or her interest or rights, should have sprung into action to seek redress without wasting any time. It is important to make this crucial point. As I have mentioned previously, a threat of legal proceedings in the form of ‘urgent interim relief’ had already been made on 29 July 2015; and its not the case where the applicants did not know what to do, as I have found previously. I should make the following point. Parties who make such threats and do not follow their threats through timeously should have their request for the court’s indulgence that the matter be heard on the basis of urgency refused.

[11] In the instant case, I fail to see any good reason, none at all, and none has been placed before the court on the papers, why when the applicants received the 4 August 2015 letter from the first respondent the applicants did not approach the court for relief when their legal representatives instructed the first respondent that in our law a person aggrieved by an act of an administrative body or an administrative official is entitled to reasons for the act, and yet got no reasons. I accept Mr Obbes’s submission that the applicants do not tell the court why a rule *nisi* proceeding could not have been instituted promptly in July 2015, or, as I say, so soon after 4 August 2015. In this regard it must be remembered that the applicants aver that they noted ‘an irregularity in the procedure in relation to the closure and opening of the tender’ on 22 April 2015. But they did not take steps to seek redress in April 2015 or July 2015; and what is more; as I have found previously, the applicants did not act so soon after 4 August 2015 despite their unambivalent and unambiguous threat to institute an application not in the ordinary course but as an urgent application. They waited until 3 September 2015, and then decided to drag the respondents to court at great speed.

[12] I have set out the aforegoing facts and analyses to come to the conclusion that the applicants have failed to set out explicitly the circumstances relating to urgency. It is also to make the point that the conduct of the applicants answers loudly to a finding that the urgency is self created. See *Bergmann v Commercial Bank of Namibia Ltd*. For these reasons alone this court is entitled to refuse to exercise its discretion in favour of hearing the application as a matter of urgency.

[13] But then Mr Namandje refers to the court *Petroneft International and Another v The Minister of Mines and Energy and Others* Case No. A 24/2011 (Unreported) to support his argument that the matter is urgent, and that it ought to be disposed of expeditiously because the public has an interest in seeing that justice is done when, according to counsel, an administrative body or an administrative official commits irregularities when carrying out an act.

[14] Mr Namandje, with respect, shoots at his own foot. If that was the position of the applicants, then I still do not see why they did not approach the court in April 2015 when the irregularities are alleged to have occurred or so soon after 4 August 2015 when they realized that their entitlement to be furnished with reasons for the first respondent's decision not to award the tender to them was violated and they were aggrieved thereby, particularly when they stated at that material time that they had grounds to rely on in order to support an application to the court to review and set aside the award of tender.

[15] I should also say that unlike *Petroneft International*, there is nothing complex in the instant matter. 'The process of preparing the application' has not been shown to be 'difficult'. It has not been shown also that it 'entailed assembling the contractual documentation, researching statutory and other material, establishing historical background and taking advice from legal practitioners and thereafter consultations and finalizing papers between London, Namibia and elsewhere'. (para 24) On the facts *Petroneft International* is clearly distinguishable.

[16] In any case, as Smuts J said in *Petroneft International* (para 28), as it should be in this case, too, 'the applicants must not however have created their own urgency'. If they felt irregularities had been committed, the more reason why they should have acted with speed and promptness.

[17] In sum, I find that the applicants have not set out explicitly the circumstances relating to urgency. What the applicants have done is to draw conclusions without setting out the facts explicitly upon which the conclusions are drawn. Indeed, the urgency is self created on any pan of scale.

[18] For these reasons alone the court is not entitled to exercise its discretion in favour of granting the indulgence sought. But for completeness, I pass to consider the applicants abortive attempt to satisfy the second element in the s 73(4) requirements.

[19] The applicants say that it 'is difficult in law to quantify damages as an alternative redress in matter(s) of this kind'; and that 'the Courts are reluctant to award damages in a public tendering process in circumstances where the irregularities are …'. Here, too, the applicants have failed to set out explicitly the reasons why they could not be afforded substantial redress in due course. The requirement is 'substantial' redress and not 'alternative' redress. In any case, the fact that it may be difficult to quantify damages in such matters does not mean that a redress in the form of damages do not exist or that damages cannot be substantial redress. Be that as it may, it must be remembered that 'substantial redress' is not synonymous with 'damages'.

[20] Based on these reasons, the application is refused, on the basis that the requirements of rule 73(4) of the rules have not been met, with costs, including costs of one instructing counsel and one instructed counsel in respect of the first and second respondents and in respect of the third respondent, respectively.

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C Parker

Acting Judge

APPEARANCES

APPLICANT :	S Namandje (assisted by A Feris) Of Sisa Namandje & Co. Inc., Windhoek
FIRST AND SECOND RESPONDENTS:	D Obbes Instructed by ENSafrica|Namibia (Incorprated as LorentzAngula Inc.), Windhoek
THIRD RESPONDENT:	C J Mouton Instructed by Neves Legal Practitioners, Windhoek