REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 421/2013

In the matter between:

CONTINENTAL OUTDOOR MEDIA (PTY) LTD	**1ST APPLICANT**
ESHISHA MEDIA NETWORKS CC	**2ND APPLICANT**

And

THE MUNICIPAL COUNCIL FOR THE CITY OF WINDHOEK	**1ST RESPONDENT**
PRIMEDIA OUTDOOR (PTY) LTD	**2ND RESPONDENT**
ALIANCE MEDIA NAMIBIA	**3RD RESPONDENT**
MEDIA SOLUTIONS GROUP	**4TH RESPONDENT**
OUTTHERE NAMIBIA	**5TH RESPONDENT**
AD OUTPOST	**6TH RESPONDENT**
ANTS ADS CC	**7TH RESPONDENT**
RAMA MEDIA CC	**8TH RESPONDENT**

Neutral citation: *Continental Outdoor Media (Pty) Ltd v The Municipal Council for the City of Windhoek* (A 421/2013) [2016) NAHCMD 44 (29 February 2016)

Coram: UNENGU AJ

Heard: **22 April 2015; 08 December 2015;**

Delivered: **29 February 2016**

Flynote: Practice – Review application – *Locus standi* – Party must have real and substantial interest in the outcome of the case – Applicant failing to persuade the Court of direct and substantial interest in the outcome of the case – at best the applicant established financial or commercial interests in the advertising business offered by the first respondent from time to time – Review application dismissed with costs.

Summary: The second applicant (Eshisha Media Networks CC) brought an application to review and set aside the decisions taken by the first respondent (The Municipal Council for the City of Windhoek) to approve the upgrading of prime lights to LED billboards – The question arose whether the second applicant has *locus standi* to bring such an application – The Court found that the second applicant does not have *locus standi* and dismissed the application with costs because the applicant failed to persuade the Court that it has direct or substantial interest in the outcome of the case.

ORDER

(i) The second applicant lacks *locus standi* to bring this review application.

(ii) The fourth respondent must comply with the notice given to it by the first respondent to remove the billboard with its foundation if not done yet.

(iii) The review application by the second applicant is dismissed and ordered to pay costs in favour of the first respondent.

JUDGMENT

UNENGU AJ:

[1] In this application, the applicants are seeking an order reviewing, correcting and setting aside the decisions taken by the first respondent.
These are:

(i) The approval granted to the second respondent to erect a light emitting diode (LED) animated billboard at Erf 8085 Katutura, Windhoek.

(ii) The approval granted to the second respondent to erect a LED animated billboard at Erf 8316 Windhoek.

(iii) The approval granted to the respondent to erect a LED animated billboard on the Airport Road, Avis, Windhoek.

(iv) The approval granted to the fourth respondent to erect a mega billboard at the intersection of Shanghai and Mungunda streets, Katutura.

[2] In the meantime, the first applicant, (Continental Outdoor Media (Pty) Ltd has withdrawn his application against the first respondent leaving the second applicant alone proceeding with the relief sought in the notice of motion.

[3] On the other hand, it is only the first and second respondents (the City Council and Primedia Outdoor (Pty) Ltd) have elected to oppose the application and had filed answering affidavits.

[4] It is worth a while at this stage of the proceedings already to mention that both applicants have sought an order from the Court to declare the erection of the billboards unlawful, in contravention of the Outdoor Advertising Regulations and the Outdoor Advertising Policy with a prayer that the billboards be broken up or be dismantled. This relief and prayer are not being pursued by the second applicant anymore. In its place, the second applicant has now asked the Court to order the first respondent to give to the second and fourth respondents notices to remove the five billboards because, according to the second applicant they were erected in conflict with the Regulations and the Policy for outdoor advertising.

[5] The application was heard by me on 22 April 2015 at 09h00 when Mr Frank appeared on behalf of the second applicant, with Mr Marcus on behalf of the first respondent and Mr Van Zyl representing the second respondent.

[6] The proceedings started off with Mr Frank addressing the Court putting on record that Mr Van Zyl, counsel for the second respondent was before court on a watching brief only. He said that should the second applicant be successful, the second applicant would not ask costs against the first and second respondents jointly and severally but will ask a cost order for the opposition put up by the second respondent. Mr Van Zyl agreed and confirmed Mr Frank's submission and in addition, pointed out that the second respondent did not take a position of common cause with the first respondent but merely to clarify issues raised in the application, not pure opposition.

[7] Another issue addressed by Mr Frank at the start of the proceedings is the condonation application filed by counsel for the first respondent. Mr Marcus filed his written heads of argument two days out of time prescribed by the Rules and the Practice Directives of this Court. The application was allowed and condoned the non-compliance with the rules and practice directives by Mr Marcus, as there was no objection or opposition from Mr Frank.

[8] Another issue worth mentioning also is the issue of a point *in limine* of *locus standi* raised by the first respondent against the second applicant, which point the first respondent has abandoned.

[9] Further, another dispute which could and shall be disposed of promptly is the issue of the billboard granted and erected by the fourth respondent, Media Solutions Group. Media Solutions Group did not oppose and defend the review application by the second applicant. In respect of the billboard, the first respondent conceded that the billboard is contrary to the regulations and should be removed. In fact, already on 06 November 2013, Ms Steenkamp, Manager for Economic Development, gave notice to the fourth respondent by letter addressed to Mr Peter Wamburi of Media

Solutions to remove the billboard and its foundation within seven working days from date of receipt of the letter with a warning that the first respondent would be compelled to take further action should it fail to adhere to the notice. Hereunder is a reproduction of such a letter:

‘RE: BILLBOARD ON ERF 9129 KATUTURA

Reference is made to the recent allocation of a portion of Erf 9129, Katutura to your company for outdoor advertising purposes.
During our routine inspection on 23 October 2013 we have noticed that a new foundation was casted only 45 m from the centre of the road. In an email communication on the same day from our Ms Fortune Kauauatuku, you were informed of this matter and requested to rectify it. However, it appears that you have proceeded to disregard our communication and continued to deliver, assemble, and erect the structure on site, without a valid lease agreement.

You are hereby informed that such action is illegal and you are requested to cease the installation of this structure with immediate effect. Furthermore, you are hereby informed that once the lease agreement is signed, you are requested to shift the foundation of your structure backward to comply with the 50 m distance requirement. Take note that you are not allowed to erect any structure on Council land without a valid lease agreement.
Therefore, you are hereby served with a seven (7) working days’ notice, with effect from the date of receipt of this letter to remove the above-mentioned illegal structure and foundation. Failure to adhere to this will compel the City of Windhoek to take further action against your company.

Should you need any clarification regarding the subject matter, kindly contact Ms Kauautuku, Coordinator Outdoor Advertising at the above-mentioned address.

Yours sincerely,

MS. Z STEENKAMP

MANAGER: ECONOMIC DEVELOPMENT

Copy: Corporate Legal Advisor
City Police'

[10] That being the case, the second applicant, also amended prayer 1.5 in the notice of motion to read:

'The removal (instead of approval) of the Mega Billboard erected by the fourth respondent at the intersection of Shanghai and Mungunda Streets, Katutura Windhoek. The prayer is in accordance with the letter above written to the fourth respondent by the first respondent. Notice to remove the billboard concerned as well as the foundation where it was fixed, has already been given to the fourth respondent and the fourth respondent has not contested the notices by the first respondent and the one brought against them by the second applicant.

[11] The Court will grant prayer (1.5) in its amended form for the fourth respondent to remove the billboard in case it has not yet done so. However, I decline to award a cost order against the first respondent with regard prayer 1.5.

[12] That brings me now to a brief survey of the background facts of the matter.

[13] In July 2012 the first respondent called for tenders to erect outdoor advertising structures on its land of which one component of the tender invited proposals for the erection of billboards on various proposed sites of Council. The second applicant and other tenderers submitted their bids for the erection of the billboards on the proposed sites. On 21 November 2012 the first respondent awarded the tender to Primedia Outdoor Namibia (Pty) Ltd (second respondent) to erect billboards on erf 8085 Katutura, erf 2621 Avis and one at the Ausspannplatz circle while erf 9129 Katutura was awarded to Media Solutions. The second applicant was unsuccessful and was duly informed and reasons were given to it on 19 November 2012 why its application was not successful and accepted.

[14] Even though the second respondent had tendered to install a Trivision-Platform-Prime Billboard measuring 40m on a 2 meter high stone wall on erf 8085 on which basis the tender was awarded to it, the second respondent, however, deviated from the tender proposal and installed a Light Emitting Diode (LED) animated billboard on the erf.

[15] Similarly, when it was found that erf 2621 Avis, awarded to second respondent for the erection of a billboard was not suitable for such purpose, the first respondent granted permission to the second respondent to erect the billboard on erf RE/6 Avis. Again the second respondent erected a LED billboard on the site contrary to the tender proposal which stated that a Trivision Billboard would be erected.

[16] As already indicated, the second respondent applied for approval from the first respondent to deviate from the tender proposals in respect of all the billboards to be erected on the sites which were granted to it. The request for such deviations were considered and granted during council meetings whereby penalties were imposed as punishment for breach of the original lease agreements.

[17] A penalty for condonation of the deviation in respect of erf 8085 and erf RE/6 was a 15% of the monthly fees or N$2250.00.

[18] In addition, it was resolved by council to increase the monthly fee for the two LED billboards to N$15 000.00 or 30% of the revenue generated per month whichever was greater.

[19] With regard erf 3816 following the award of tender M46/94 to the second respondent by the Local Tender Board on 5 May 2008, an agreement was entered into between the council and the second respondent to lease various sites to second respondent starting from 1 January 2009 to 31 December 2014. The lease agreement in clause 15.15 provided that the second respondent had to provide advertising exposure to council in the amount of N$250 000.00 on two prime lights

structures that were to be erected on selected first respondent's properties. Erf 8316 was identified as one of the sites where a prime light should be erected.

[20] That being so, first respondent (council) and second respondent on 25 February 2010 concluded an addendum to the 2008 lease agreement, which addendum set out the obligations of the parties with regard prime lights, amongst others.

[21] As a result, therefore, a prime light was erected on erf 8316 during 2010, the same place where the LED billboard is now located. The second respondent applied to first respondent on 16 October 2012 to upgrade the prime light on erf 8316 to an LED billboard and was granted the approval on 21 January 2013 following a long standing practice.

[22] What I have stated above is the spark which ignited this application. These are the events which aggrieved the second applicant to initiate the review proceedings against the respondents on the grounds set out in the notice of motion which grounds the second applicant has amended during the hearing of the application.

[23] It is common facts that the first respondent put out a tender inviting people to tender for the erection of prime light billboards on certain pre-determined sites of which erf 8085, erf 8316, erf 2621 (Avis) formed part. It is also not in dispute that the second applicant and respondent two to eight participated.

[24] It is also not disputed that the second applicant was not successful in his bid while the second and the fourth respondents were successful and were awarded the tender to erect the prime light billboards on the sites indicated herein.

[25] At the hearing of the application on 22 April 2015, Mr Frank, counsel for the second applicant argued that apart from the billboard awarded to the fourth respondent in Katutura, all the other billboards were awarded pursuant to tenders which called for prime light billboards.

[26] He further argued that what were erected on the sites and the alternative site though are LED billboards, which are billboards with moving images, operating virtually like a cinema or like a TV screen with moving images. He submitted that the upgrade from prime light to LED billboards were wrongfully approved seeing that the tender was for prime light billboards which are not moving images.

[27] On a question from the bench to clarify what he meant by 'approved by the tender', Mr Frank replied as follows:

'It was a tender put out by the Municipality to invite people for certain . . . to tender in respect of certain pre-determined sites to erect prime light billboards.'

[28] It is thus clear from Mr Frank's submissions above that his client (second applicant) was not happy that the first respondent allowed the second respondent to erect LED billboards instead of prime light billboards which were called for in the tender specifications. However, inspite this unhappiness the applicant did not approach the court with a request to cancel the tender award because, in my view, after awarding the tender to the second and fourth respondents, the tender process stopped, and what came into being after that, is a different relationship between the first respondent and the successful tenderers. In this instance, a contractual relationship between the first respondent, and the second and fourth respondents only, which are the lease agreements, to lease the sites.

[29] This relationship of employer and employee between the first respondent and the second and fourth respondents was accepted by all other respondents including the two applicants, as they opted not to challenge the award of the tender to the two successful respondents. In para 49 of the main heads of argument, the second applicant confirms and states as follows:

'49. The applicant's case has never been that it takes issue with the award of those tenders. The applicant quite clearly sets out in its notice of motion and the founding papers that the relief sought is against the *implementation of the tender* and more

specifically the unlawful decisions in respect to specific billboards on the sites that were awarded to the second and the fourth respondents during the tender process.'

[30] It is apparent from the aforesaid, therefore, that the second applicant is not happy in the manner the first respondent was implementing the tender or how the second respondent was executing the tender awarded to it.

[31] The first respondent's stance on the decision to condone the second respondent's deviation from its tender proposal is that it is contractual not administrative decision – and in some respect it was done in accordance with a long-standing practice, they argued.

[32] Therefore, and in view of the concession made by the second applicant that the complaint was against the implementation of the tender, I invited counsel to file supplementary heads of argument and address me on the issue of legal standing of the second applicant to bring the review application against the implementation of the tender or against the manner how the tender was being implemented by the second respondent, which complaint, I thought, amounted to policing the execution of the tender proposals by the respondents or whether it is not an issue of sour grapes on the part of the second applicant.

[33] Be that as it may, *locus standi* was argued on 8 December 2015 whereafter judgment was reserved again. Mr Frank persisted in his submission that, because the tender was awarded on the basis that the billboards would be erected in terms of the policy and regulations for which approvals to upgrade the billboards to LED were sought and granted by the first respondent. The approvals by first respondent to upgrade the billboards and in one aspect, the approval to move the site, are, according to counsel, the decisions being attacked. He argued that the application is to review the decisions subsequent to the tenders. To support his point, he referred the Court amongst others, to the judgment of *Kleynhans v Chairperson for the Municipality of Walvis Bay and Others*[1] where Damaseb JP said the following:

[1] 2011 (2) NR 437 (HC) at 447 [29].

‘In my view a person is entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained. I also consider that he may take appropriate legal steps to ensure that nobody diminishes these amenities unlawfully . . . In the present case the applicant is an immediate neighbour to the property on which the non-conforming garage was built.’

[34] I agree with the sentiments expressed by Damaseb JP in the *Kleynhans* matter above. However, I must point out that the facts in the *Kleynhans* matter are distinguishable from the facts in the instant matter. In the matter at hand, we are dealing with two contracting parties of which one had been permitted by the affected party to deviate from the initial agreement against a penalty for the deviation.

[35] One should not lose sight that in terms of the law of contracts, there are three remedies available to an innocent party in case of a breach of the contract by the other party. These are (a) to uphold the contract and insists upon the agreed performance (specific performance) or (b) to uphold the contract and accept the defective performance or (c) to resile from the contract. But whichever course the innocent party may decide on, that party is entitled to compensation for any damage which he may suffered. That is trite law. The first respondent opted for the second choice. I do not think that the first respondent had a duty to involve the applicant in the implementation of the tender by the second respondent.

[36] The first respondent had an option to cancel the lease agreement between it and the second respondent and claim damage suffered but selected to allow the second respondent to erect something different from what was tendered for on its sites, but against penalties.

[37] The question arises now (i) whether the second applicant has *locus standi* to bring this review application before one could look into the issue of whether the decision taken by the first respondent to approve the upgrading of the prime lights to LED billboards are administrative decisions or not. If the answer to the question is yes then a follow up question will be whether the first respondent breached or

disregarded its regulations or policy while implementing the tender awarded to the second and fourth respondents?

[38] For the second applicant to have *locus standi* it must be an interested person against whom or in whose favour (in this case) the order will operate[2]. It was submitted on behalf of the second applicant that it has established a *locus standi* because it was one of a number of persons involved in the outdoor advertising business. Is this not boiling down to financial or commercial interest? I shall think so.

[39] In *Stellmacher v Christians and Others*[3] Silungwe AJ dealt with the expression 'interested person(s)' and said the following:

'Hence, the first and fourth respondents are entitled to be heard in the matter. In other words, they do have locus standi in this case.

The expression 'interested person' judicially means someone who has a direct and substantial interest in the subject matter and the outcome of the litigation. The interest must be a real interest, not merely an abstract or academic interest. A mere financial or commercial interest will not suffice. See *Family Benefit Friendly Society* case supra at 124F-J.'

[40] The second applicant failed to persuade the court that, apart from a mere financial or commercial interest he has in the advertising business offered by the first respondent from time to time, he has a direct and substantial interest in the subject matter and the outcome of the litigation. In my view, the only litigants having a direct and substantial or real interest in the subject matter and the outcome of the litigation are the first and second respondents. That being the case, I have come to the conclusion that the second applicant lacks *locus standi* to bring this review application.

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[2] Family Benefit Friendly Society v Commissioner for Inland Revenue and Another 1995 (4) SA 120T at 125.
[3] 2008 (2) NR 587 at 591B-C.

[41] Therefore, and in view of the conclusion I have arrived at, I do not find it necessary to decide whether or not the decisions taken by the first respondent to approve the upgrading of prime light to LED billboards were administrative actions.

[42] In the result and for the reasons given above, I make the following:

(i) The second applicant lacks *locus standi* to bring this review application.

(ii) The fourth respondent must comply with the notice given to it by the first respondent to remove the billboard with its foundation if not done yet.

(iii) The review application by the second applicant is dismissed and ordered to pay costs in favour of the first respondent.

E P UNENGU

Acting Judge

APPEARANCES

2ND APPLICANT	T Frank SC, (with him J Jones) Instructed by Engling, Stritter & Partners, Windhoek
1ST RESPONDENT	N Marcus of Nixon Marcus Public Law Office, Windhoek
2ND RESPONDENT:	C Van Zyl (watching brief) Instructed by Francois Erasmus & Partners, Windhoek

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