

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGEMENT**

**CASE NO. A 56/2016**

In the matter between:

**VIRTUAL TECHNOLOGY SERVICES (PTY) LTD**

**APPLICANT**

And

**THE CHAIRPERSON OF THE NAMIBIA STUDENTS**

**1<sup>ST</sup> RESPONDENT**

**FINANCIAL ASSISTANCE FUND BOARD**

**NAMIBIA MINeworkERS INVESTMENT CORPORATION**

**2<sup>ND</sup> RESPONDENT**

**(PTY) LTD**

**Neutral citation:** *Virtual Technology Services (Pty) Ltd v The Chairperson of the Namibia Student Financial Association Fund Board & Another* (A 56/2016) [2016] NAHCMD 72  
(11 March 2016)

**Coram:** ANGULA, DJP

**Heard:** 03 March 2016

**Delivered:** 11 March 2016

**Flynote:** Applications and Motions - urgent application for interdictory order pending a review application to review and set aside an award of a contract to provided services.

**Summary:** The applicant was one the tenderers who submitted tenders for the provision services for payment of money by the Fund, into the bank accounts of the students receiving financial assistance from the Fund. The applicant is aggrieved that the contract was not awarded to it and alleged that this was due to flawed process adopted by the first responded which was contrary to the original tender terms. Applicant launched the application seeking for an interim order against the respondent interdicting the respondents from further

implementing the contract pending the outcome of the review proceeding simultaneously launched with the application for interdict. The application was opposed by the first respondent who raised three points *in limine*. The first point *in limine* was that there has been a mis-joinder in that first respondent, the chairperson of the board of the Fund should not have been cited as a party to the proceeding, for the reason that the Fund itself, as a juristic person, should have been sued. Against this point; the applicant contended that it was permissible to sue the chairperson by virtual of the provision of Rule 76 (1). The second point *in limine* was similarly mis-joinder in that it was not the second respondent to whom the contract was awarded by the Fund, but that the contract was awarded to a different company within the second respondent's group of companies. This point was conceded by the applicant. The third point *in limine* was of non-joinder is that the company which was awarded the contract has not be joined as a party to the proceedings. This point was equally conceded by the applicant.

*Held* that where a party or entity to the proceedings whose decision is sought to be reviewed and set aside is a juristic person then in that event such party or entity must be cited as a party to the proceedings and the provisions of Rule 76(1) are not applicable.

*Held* accordingly that a wrong person, being the chairperson of the board of the Fund instead of the Fund itself, which is a juristic person, has been brought before court.

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**ORDER**

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The application is dismissed with costs such costs to include costs on one instructed counsel and one instructing counsel.

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**JUDGMENT**

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ANGULA, DJP:

**Background**

[1] This is an application by the applicant for an urgent interdictory interim order against the respondents set out in part A of the Notice of Motion, pending the determination of the review

proceedings set out in Part B of the Notice of Motion, interdicting and restraining the respondents from implementing the terms of a contract allegedly awarded by first respondent to the second respondent.

[2] The contract concerns the provision services for payment of money by the Fund into the bank accounts of students who are receiving financial assistance from the Fund. The applicant was one the bidders to whom the contract was not awarded. The applicant says that it is aggrieved by the process which was followed by the first respondent and which led to the applicant being disqualified and not awarded the contract. The application is opposed by the first respondent. Mr Narib appears for the applicant while Mr Maasdorp appears for the first respondent on instruction of Tjombe-Elago Law Incorporated. There is no appearance for the second respondent.

[3] Two points *in limine* have been raised on behalf of the first respondent namely; a point of non-joinder and secondly a point of mis-joinder. With respect of the first point of non-joinder the first respondent points out that no contract was awarded by the first respondent to the second respondent and that the contract was awarded to Nam-Mic Payment Solution Pty Ltd. As proof a copy of the first page of the contract document entered into between the Fund and Nam-Mic Payment Solution (Pty) Ltd is attached to the first respondent's affidavit.

[4] Mr Narib, correctly in my view, conceded that there have been both a non-joinder as well as mis-joinder. On the one hand, Nam-Mic Payment Solution (Pty) Ltd which the correct party which entered into the contract with the Fund is not before court – thus a non-joinder. On the other hand Namibia Mine Workers Investment Corporation (Pty) Ltd which was not awarded the contract and did not enter into a contract with the Fund has been brought before court - thus a mis-joinder.

[5] As a result of the fact that the applicants both points *in limine* namely; the non-joinder and the mis-joinder have succeeded, the only party remaining before court is the first respondent. The presence of the first respondent before court is however also not without a challenge by the first respondent. Mr Maasdorp argues that the person who should have been sued or cited in this proceedings is the Fund itself and not the Chairperson. He points out that this is yet another mis-joinder. In this respect Mr Maasdorp points out further that in term of section 3(2) of the Namibia Student Financial Assistance Act, No. 26 of 2002, (the Act) the Fund is a juristic person; that the Fund is the right person who should have been cited as the respondent to this proceedings and not the chairperson of the board of the Fund. Mr Narib on the other hand submits that the rules of this court, particularly Rule 76 (1) requires and allows in circumstances such as the present matter for the chairperson of an institution such as the first respondent to be cited in the proceedings. He thus contends that the point of mis-joinder raised by the respondent in this respect is not well-taken.

[6] As a result of these opposing contentions the question which therefore presents itself for determination is whether the right person to sought to be interdicted has been cited and is before court.

[7] In order to answer that question is necessary to first consider the applicable legal principles with regard to the citation of a chairperson of a board of an institution as a party to the proceedings before court like in the present application.

[8] Rule 76(1) upon which Mr Narib *inter alia* place reliance for his contention reads:

**'Review application**

76 (1) All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official are, unless a law otherwise provides, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all other parties affected.'

[9] In further support of his submission Mr Narib referred the court to the decision of *Safcor Forwarding (Johannesburg) Pty Ltd // National Transport Commission (NTC)* at page 672 D where the court stated the following with regard to the provision of Rule 53 which was the predecessor to the current Rule 67 (1):

'For these reasons I am of the view that Rule 53 (1) requires the notice of motion to be directed and delivered to the chairman of the board in his representative capacity for and on behalf of the board. It does not require the separate citation of the board itself. Admittedly Rule 53 (1) (b) calls upon, *inter alios*, the chairman to despatch the record etc, but this is done in his capacity as chairman and, in any event, this does not require the separate citation of the chairman as a party<sup>1</sup>.'

[10] The decision in *Safcor* was considered by Van Niekerk J in the matter of *Seagulls Cry CC // The Council of the Municipality of Swakopmund* as first respondent, The Major of the Municipal Council of Swakopmund as second respondent and The Chairperson of the Management Committee of the Municipal Council of Swakopmund as third respondent. <sup>2</sup> The case and the following at para 11-13:

'However, in my view counsel's reliance on the *Safcor* case is misplaced. The issue in *Safcor* was whether there was a fatal non-joinder because of non-compliance with rule 53(1), if a statutory board is cited *eo nomine* instead of the chairperson of the board in a representative capacity. The Appellate Division held (at 673B) that this failure did not merit the dismissal of the application with costs and finally pointed out that "*it was not a case of the wrong person being before the Court, but a case of the right person having been incorrectly cited*" (at 673G). However, the second respondent in this case was not cited in her representative capacity as

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<sup>1</sup>*Safcor Forwarding (Johannesburg) (Pty) Ltd v NTC* 1982 (3) page 672 D.

<sup>2</sup>*Seagull's Cry v Council of the Municipality of Swakopmund and Others* 2009 (2) NR 769 (HC).



chairperson of the municipal council, but as a separate party. In the case of second respondent it is “a case of the wrong person being before the Court”.’

‘Furthermore, as the decisions sought to be reviewed are those of the first respondent council, of which the second respondent is the chairperson, there is in my view no need to join second respondent. There is also no need to join the third respondent who merely made recommendations to first respondent.’

‘In the result the application is dismissed against the second and third respondents.’

[11] The point of mis-joinder was again dealt with by Parker, J in the matter of *Premier Construction CC // Chairperson of the Tender Committee of the Namibia Power Corporation Board of Directors*<sup>3</sup> where the learned judge had the following to say at para [7] and [8]

‘[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

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<sup>3</sup>*Premier Construction CC v Chairperson of the Tender Committee of the Namibia Power Corporation Board of Directors* (A 200/201) [2014] NAHCMD 270 (17 September 2014).

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 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 who the third respondent should award the tender.'

[12] I fully agree with the principles outlined in the two cases cited above and in my view the principles are equally applicable to facts of this application. In the present application the first respondent is cited as: "*The First respondent is the Chairperson of the Namibia Students Financial Assistance Fund Board, a Fund duly established in terms of section 3 (1) of the Namibia Students Financial Assistance Fund Act, 2000*". It is to be noted that the first respondent has not

been cited as party to the proceedings “*in her representative capacity as chairperson of the board of the Fund*”. Therefore in my view the decision in *Safcor* is not of assistance to the applicant in this matter. I do not think that even if the chairperson was cited in a representative capacity of the Fund that would have made a difference, because there would not have been any legal justification to cite a representative while the principal legal person (the Fund) of such a ‘representative’ is available and could have been cited and made a party to the proceedings. The Fund is not a mere statutory body; it is a juristic person in terms of section 3 and as such is capable of being sued. As Parker AJ correctly pointed out in *Premier Construction CC*, the decision sought to be reviewed and set aside, is that of the juristic person, the Fund, and not of the chairperson who has no executive power but merely presides over the proceedings of the board of the Fund. It would thus appear to me that where a party or an entity whose decision is sought to be reviewed and set aside is a juristic person then in that event such party or entity must be cited as a party to the proceedings and the provisions of Rule 76 (1) are not applicable. I have therefore come to the conclusion that a wrong person, being the chairperson of the board of the Fund, has been brought before court in this application.

In the result the application is dismissed against both respondents with costs, such cost to include the costs on one instructing counsel and one instructed counsel.

[13] In the result I make the following order:

The application is dismissed with costs such costs to include costs on one instructed counsel and one instructing counsel.

H Angula

Deputy-Judge President

**APPEARANCES**

APPLICANT:

Mr Narib  
Instructed by the Shikongo Law Chamber

1<sup>st</sup>

RESPONDENT:

Mr Maasdorp  
Instructed by Tjombe-Elago Incorporated

2<sup>nd</sup>

RESPONDENT

NAMIBIA MINEWORKERS INVESTMENT  
CORPORATION (PTY) LTD