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) [2017] NAHCMD 24 (2 February 2017)

Coram: PARKER AJ
Heard: **1 November 2016**
Delivered: **2 February 2017**

Flynote: Practice – Applications and motions – Urgent application – Applicant's urgent application for interim interdict struck from the roll for lack of urgency – Applicant enrolling and setting down a judicial review application in place of the interim interdict application and under the selfsame interim interdict application case number – Such not permitted – The court held that where a court refuses to condone non-compliance with the rules of court that is the end of the particular process – There having been no adjudication of merits of the dispute, a litigant may in the ordinary course and using the prescribed form bring such dispute before the court – In the instant case applicant enrolled and set down a totally new application, viz. a judicial review application, but that application was not brought in terms of rule 76 of the rules of court as the law has prescribed and demands – Accordingly, court found the application to be defective and the procedure irregular – In the result the court held was that there was no judicial review application before the court for the court to determine – Consequently, application struck from the roll with costs. Principles in *Swakopmund Airfield v Council of the Municipality* 2013 (1) NR 205 (SC); and in *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Institutions Supervisory Authority and Registrar of Stock Exchange* (HC-MD-CIV-MOT-GEN-2016/00233) [2016] NAHCMD 365 (17 November 2016) applied.

Summary: Practice – Applications and motions – Urgent application – Applicant's urgent application for interim interdict struck from the roll for lack of urgency – Applicant enrolling and setting down a judicial review application in place of the interim interdict application and under the selfsame interim interdict application case number – Such not permitted – Where a court refuses to condone non-compliance with the rules of court that is the end of the particular process – There having been no adjudication of merits of the dispute, a litigant may in the ordinary course and using the prescribed form bring such dispute before the court – In the instant case

applicant enrolled and set down a totally new application, viz. a judicial review application, but that application was not brought in terms of rule 76 of the rules of court as the law has prescribed and demands – Accordingly, court found the application to be defective and the procedure irregular – Applicant instituted urgent application for interim interdict and prayed for a rule *nisi* – Applicant's urgent application struck from the roll for lack of urgency – Applicant bringing fresh application on the same papers for judicial review of decision of 1st respondent to award tender to 3rd, 4th, 5th and 6th respondents – Applicant's bid was unsuccessful – Since subsequent application was for judicial review it should have been brought under rule 76 of the rules of court – Court found the present application to be defective and the procedure to be irregular – The result being that there was no judicial review application before the court for the court to consider – Consequently, application struck from the roll with costs.

ORDER

(a) The application is struck from the roll.

(b) The applicants must, one paying the other to be absolved, pay to the 1st respondent and 2nd respondent their costs of the application, including costs occasioned by the employment of one instructing counsel and one instructed counsel.

(c) The applicants shall, one paying the other to be absolved, pay to the 3rd respondent its costs of this application, including costs occasioned by the employment of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] Once again we have before us, and it is our duty to determine, an application which appears to mount a challenge to a decision of the 1st respondent to award a tender to 3rd, 4th, 5th and 6th respondents. Applicants were part of the unsuccessful tenderers. The 1st and 2nd respondents, as well as the 3rd respondent, have moved to reject the application.

[2] The manner in which the application under case No. 236/2015 has been pursued by the applicants raises very important issues of practice and procedure of motion proceedings in the court; and so, they should be dealt with at the threshold, and also for the reason that if the preliminary points raised by the 1st, 2nd, 3rd respondents were upheld, it would dispose of the application.

[3] On 3 September 2015 applicants instituted an interim interdict application by notice of motion and prayed for the court to hear the matter on the basis of urgency ('the urgent application'). For good reason that will become apparent in due course, I set out, hereunder, the relevant part of the notice of motion:

'**BE PLEASED TO TAKE NOTICE THAT** applicant shall make application in this Court on **16 October 2015** at **09h00** or as soon thereafter as counsel maybe heard, for the following orders:

1. Condoning the applicants' non-compliance with the Rules of this Court relating to service and time periods and ordering that the matter be heard on an urgent basis.

2. Authorizing the applicants to serve the order (rule nisi) to all interested parties in the Namibian newspaper within 10 (ten) working days of the order and further directing the applicants to, by notice in the same newspaper, invite all interested parties to obtain the application from the applicants' legal practitioners' offices.

3. Issuing a rule nisi calling upon the respondent and all interested parties to show cause on FRIDAY, 27 NOVEMBER 2015 why the order in paragraph 3.1 hereof cannot be made final:

    3.1 Reviewing and setting aside the second alternatively first respondent's decision to award tenders to the third, fourth, fifth and sixth respondents

and referring the decision back to the third, fourth, fifth and sixth respondents and referring the decision back to the first respondent to be considered in accordance with the judgment of this court and in terms of the law.

4. Ordering that the order obtained under paragraph 3.1 serve as an interim interdict with immediate effect, pending the return date.

5. Costs of suit.

6. Further and/or alternative relief.'

[4] It is abundantly clear that the substantive orders sought by the applicants in the 3 September 2015 urgent application appear in paras 3 and 4 of the notice of motion. The following analysis is important and significant for our present purposes: (a) On 3 September 2015, the applicants did not approach the court to review the decision of the 'second alternatively first respondent's decision to award tenders to the third, fourth, fifth and sixth respondents'. The applicants came to court to pray to the court to grant an interim interdict (see para 4 of the notice of motion) and prayed for a rule *nisi* (see para 3 of this judgment). The irrefragable conclusion that arises inevitably is this. The urgent application was not an application to review the decision of the 1st respondent and/or 2nd respondent on the basis of urgency, as was the case in *New Era Investment v Roads Authority* 2014 (2) NR 596 (HC). There, the applicant instituted an application to review on urgent basis the decision of the 1st respondent for awarding a tender to the 5th respondent. Having heard arguments, the court 'was persuaded to hear the matter (ie the review application) as an urgent application' (see para 13 of the judgment in *New Era Investment*).

[5] In the instant case, unlike the *New Era Investment* case, the applicants did not in September 2015 institute a review application in which they asked the court to hear on urgent basis the urgent review application; the applicants instituted an application in which they prayed the court to grant an interim interdict order and prayed for the issuance of a rule *nisi,* returnable on Friday, 27 November 2015. In any case, the fact must be stated, asking an administrative body or official to justify its, his, or her administrative action is not part of our law. See *Immanuel v Minister of Home Affairs and Others* 2006 (2) NR 687 (HC).

[6] It follows inexorably that the application that was 'refused' by the court 'on the basis that the requirements of rule 73 (4) of the rules have not been met' (see para 20 of the 17 November 2015 judgment) *was not a judicial review application* but an application for an interim interdict (see paras 3 and 4 of the September 2015 urgent application). (*Italicised for emphasis)* The upshot of this finding is that – and this is extremely important and significant – the applicants have not instituted any application to review the decision of the 1st respondent and/or 2nd respondent – not in September 2015 or at all.

[7] On the high authority of Strydom AJA in *Swakopmund Airfield v Council of the Municipality* 2013 (1) NR 205, para 28 –

> 'In Namibia, as in other divisions in South Africa (see *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 110G), and as was also submitted by Ms Schneider, an urgent application generally starts with a prayer for condonation with the non-compliance with the rules of court, particularly in regard to the form in which the application is brought and the limited time or service whereby notice of the application is given to the other party. Where a court refuses to condone non-compliance with the rules that is, generally speaking, the end of that particular process unless the court gives other directions regarding its prosecution or unless the parties otherwise agree. Because there was no adjudication on the merits of the disputes between the parties, a litigant may, now in the ordinary course and using the prescribed form, bring such dispute before the court. However, once the matter is struck from the roll for lack of urgency, it is no longer part of the litigious process and an applicant is left with various options which he can choose from. He can again use the affidavit evidence which supported the urgent application but he will have to adapt his notice of motion to now comply with the rules in regard to forms and times prescribed in regard to forms and times prescribed for delivery of a notice to oppose, delivery of answering affidavits, etc. He could bring a totally new application or he may choose to take no further steps. In this particular instance the applicant chose to bring a new application based on a fresh affidavits and, in my opinion, it could do so without risking a plea of *lis alibi pendens* because the urgent application was struck from the roll and was no longer a pending *lis*. (See in this regard *Mahlangu and Another v Van Eeden and Another* [2000] 3 All SA 321 (LCC) at 335 para 25; and *Commissioner, South Africa Revenue Service v Hawker Aviation Partnership and*

Others 2006 (4) SA 292 (SCA) [2006] 2 All SA 565 at para 9.) Another indication that the matter, once struck from the roll, was not alive, is that whatever choice an applicant should make, it would again have to serve that process on the other party.'

[8] In the instant case, once the urgent interim interdict application was struck from the roll for lack of urgency; 'it was no longer part of the litigious process', and applicants were at liberty to 'bring a totally new application based on fresh affidavits'. The applicants chose to bring a totally new application, viz, a judicial review application. In that event, the applicants were bound by the rules to bring the judicial review application under rule 76. Because the applicants failed to do that, the application is defective and the procedure irregular. (See *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Financial Institute Supervisory Authority and Registrar of Stock Exchanges* (HC-MD-CIV-MOT-GEN-2016/00233) [2016] NAHCMD 365 (17 November 2016).) The irrefragable result is that there is no judicial review application before the court for the court to determine.

[9] I, therefore, accept submission by Mr Mouton, counsel for 3rd respondent, that 'it was not competent (I would say it was highly irregular) for the Applicants to simply have continued to have enrolled this matter in the fashion they did'. Mr Obbes, counsel for 1st and 2nd respondents, made submissions in similar vein and with similar import.

[10] Based on the aforegoing reasoning and conclusions, I hold that there is no application brought in terms of the rules of court and the law to review the decision of the 1st respondent to award the tender to the 3rd, 4th, 5th, and 6th respondents. If there is no review application, then there is nothing before the court for the court to determine; for, *ex nihilo nihil fit*.

[11] In the result, the preliminary points raised by the 1st and 2nd respondents and 3rd respondent succeed, whereupon, I make the following order:

(a) The application is struck from the roll.

(b) The applicants must, one paying the other to be absolved, pay to the 1st respondent and 2nd respondent their costs of the application, including

costs occasioned by the employment of one instructing counsel and one instructed counsel.

(c) The applicants shall, one paying the other to be absolved, pay to the 3rd respondent its costs of this application, including costs occasioned by the employment of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANTS:	S Namandje 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