

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

HC-MD-CIV-MOT-GEN-2020/00318

In the matter between:

SJV MEDICAL SUPPLIES CC

APPLICANT

and

THE REVIEW PANEL

1ST RESPONDENT

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA
(MINISTRY OF HEALTH AND SOCIAL SERVICES)**

2ND RESPONDENT

SUPRA MEDICAL CARE (PTY) LTD

3RD RESPONDENT

Neutral Citation: *SJV Medical Supplies CC v The Review Panel* (HC-MD-CIV-MOT-GEN-2020/00318) [2020] NAHCMD 460 (6 October 2020)

CORAM: **MASUKU J**

Heard: 30 September 2020

Delivered: **6 October 2020**

Flynote: Civil Procedure – Urgent application – Rules of Court – rule 73(4) – joinder of parties – considerations informing joinder of necessity discussed.

Summary: In this application, the applicant SJV Medical Supplies CC moved an urgent application seeking an interdict regarding the staying of a decision to award a tender for medical supplies to Supra Medical Health Care Johannesburg (Pty) Ltd, pending the review of the said decision. The respondents, being the Ministry of Health and Supra, opposed the application. Supra, in particular, raised the issue of the non-joinder of the other unsuccessful tenderers and applied for the matter to be stayed pending the joinder of the said parties.

Held: that whether a party has to be joined to proceedings depends on whether the said party has a direct and substantial interest in the relief sought or where the order cannot be carried out without affecting that party's interests.

Held that: the parties who were unsuccessful are entitled to be joined for the reason that the order sought, even on an interim basis, may affect their interests. The fact that they did not appear before the Review Panel does not entitle the applicant not to join them in the proceedings.

Held further: that in any event, the proceedings before the Review Panel were seeking different types of relief and the respondents were not the same as those serving before court presently.

Held: that the said parties have a right to oppose the granting of the interim relief sought, or to support it for that matter and if they are denied this, if the interim order is refused, they may not have an opportunity to deal with the main application for review.

The point of non-joinder was upheld and the applicant was ordered to join all the unsuccessful bidders as parties to the entire application.

ORDER

1. The point of law *in limine* of non-joinder of necessary parties by the Applicant succeeds.
2. The Applicant is ordered to pay the costs of the joinder application, together with costs occasioned by the withdrawal of the application, consequent upon the employment of one instructing and two instructed Counsel, where employed.
3. The matter is removed from the roll and is regarded as finalised.

RULING

MASUKU J:

Introduction

[1] Presently submitted for determination, is an application brought by the applicant SJV Medical Supplies CC, on urgency. In essence the applicant seeks two types of relief. First is the granting of an interim interdict preventing the Ministry of Health, cited as the 2nd respondent, from awarding Tender: G/OIB/131MS-3/2019 to the 3rd respondent, Supra Health Care Johannesburg (Pty) Ltd, pending an application for review by the applicant.

[2] The application is opposed by both the Ministry of Health and Supra Health Care Johannesburg (Pty) Ltd. The 1st respondent, the Review Panel opted, probably correctly so, to abide by the decision of the court, regardless of which side the axe happens to fall at the end of the matter.

[3] I will, for ease of reference, refer to the parties in the matter in the following manner: SJV Medical Supplies CC, will be referred to in this application as 'the applicant'. The Review Panel will be referred to as 'the 1st respondent'. The Ministry of Health and Social Services will be referred to as

'the Ministry', whereas Supra Health Care Johannesburg (Pty) Ltd will be referred to as 'the 3rd respondent' or simply as 'Supra'.

[4] I should, before embarking on a determination of the issue forming the basis of this judgment, mention that an issue had been raised by Supra regarding an incorrect citation of its name in the papers. As would be evident, the applicant had cited Supra in the papers as 'Supra Medical Care (Pty) Ltd. The words 'Health' and Johannesburg had been omitted. An agreement was thus between the relevant parties reached for Supra's name to be amended accordingly and there is now no issue in that regard.

Background

[5] Because of the limited nature of the present enquiry, as will be evident below, it is unnecessary to refer to the background in detailed terms. I will articulate the background facts, which appear, for the most part to be common cause, in very broad strokes. I do so presently.

[6] The Ministry, in line with the Public Procurement Act, 2005, (the Act), advertised a bid for tenders for the supply and delivery of clinical medical products. A large number of entities put in their bids for the tender. The applicant and Supra were among the bidders. Issues are raised about whether Supra's bid should have been considered and that is a matter that would have to be determined once the preliminary issue has been determined.

[7] The applicant cries foul because it received a notice of selection for the award in favour of Supra. It contests the propriety of the said notice on various grounds that need not detain the court at this juncture. It is for that reason that the applicant has approached the court to issue a temporary interdict staying the imminent awarding of the tender to Supra, pending the determination of the application for review it has simultaneously launched with the application for interim relief.

[8] I should state that it would appear that both parts of the relief sought, namely the interim interdict and the review proper, are opposed by the respondents on grounds that will be determined at the appropriate juncture. Supra, represented by Mr. Heathcote, raised a preliminary point of law, in Supra's rule 66(1)(c) notice, namely, the non-joinder of other parties to the tender. It is his case that the matter should not proceed before the joinder of all the interested parties.

[9] As I understand the applicant's case, the applicant appears to accept in principle the need to join the other bidders and this, as I further understand, should be for the purposes of the main relief, namely, the review. Mr. Muhongo, for the applicant argued that the joinder of the parties is not necessary for the urgent interim relief sought.

[10] In this ruling, the court will examine the correctness of the positions of the parties and determine whether the other bidders have a direct and substantial interest in the granting of the interim interdict. If the court finds that the other bidders do have a direct and substantial interest in the granting of the interim interdict, then Mr. Heathcote will have been correct and the joinder of those parties, even before the preliminary issue of urgency is heard will become necessary.

[11] If, on the other hand, Mr. Muhongo is correct, the matter may proceed to be heard regarding the propriety or otherwise of issuing an interim interdict as prayed for by the applicant, pending the determination of the application for review. I proceed to deal with the issue of joinder presently.

Non-joinder

[12] In the rule 66 notice, Supra points out that from the documents filed, including the applicant's founding affidavit, it is apparent that there are 26 bidders who submitted bids for the award of the tender in question. It is Supra's case that all those tenderers have a direct and substantial interest in

the outcome of the proceedings, including the issuance or otherwise of the interim interdict sought.

[13] In *Ondonga Traditional Authority v Oukwanyama Traditional Authority*¹ Miller AJ made the following lapidary remarks regarding the question of joinder:

‘It is trite that when a person has an interest of such a nature that he or she is likely to be prejudicially affected by any judgment given in the action, it is essential that such a person be joined as an applicant or respondent. The objection of non-joinder may be raised where the point is taken that a party who should be before court has not been joined or given notice of the proceedings. The test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned. This test was applied in *Kleinhans v The Chairperson of the Municipality of Walvis Bay and Others*,² where Damaseb JP at 447 para 32 said:

“The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order, which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion. Clearly, the *ratio*, in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party”.

[14] The contents of the above paragraph are very plain and need not be interpreted. The principle enunciated is that a party who has a direct and substantial interest in an order or judgment of the court, should be joined as a

¹ 2017 (3) NR 709 (HC).

² 2011 (2) NR 437 (HC).

party as his or her rights will be affected by the order or if the order cannot be carried into effect without affecting that parties' rights and interests. (See also *Atlantic Ocean Management (Proprietary Limited v The Prosecutor-General)*).³

[15] In argument in support of his proposition, Mr. Heathcote relied on the judgment of this court in *Namibia Construction (Pty) Ltd v The Chairperson of the Tender Board*⁴ in which Ndaendapo J held that in that case, the unsuccessful tenderers were known to the applicant and that they had a direct and substantial interest not only in the subject matter of the hearing but also in the outcome of the litigation. He reasoned that those tenderers ought to have been joined and that nothing suggested that they had waived their right to be joined to the proceedings.⁵

[16] In his counter argument. Mr. Muhongo submitted that the court should regard the *Namibia Construction Company* case as distinguishable from the instant case. This he reasoned was because the present case is predicated on a different statutory regime from the one in the former case. In this regard, he further contended, the current Act grants the parties affected the right to exhaust local remedies and in doing so, only two of the affected parties presented themselves before the Review Panel.

[17] I am of the considered view that innovative and attractive as the argument by Mr. Muhongo may be at first blush, the question of the parties who have an interest in the outcome of this matter, cannot, with respect, be confined to the parties who participated in the proceedings before internal bodies created by the Act. It may be that parties may have developed some lethargy regarding participation in the internal processes but that cannot be a cue that is definitive that those parties do not have any interest in pursuing the proceedings before this court.

³ (HC-MD-CIV-MOT-GEN2017/00172 (11 March 2019), para 25.

⁴ (S 283-2007) [2014] NAHCMD 6 (21 January 2014).

⁵ *Ibid*, para 8.

[18] To do so may well imperil the rights and interests of affected parties, as we, sitting in court, are not in a position to know what their view of the matter, once served with the papers would be. In this regard, the question should be whether the party has a direct and substantial interest in the order that this court might make and if it does, it should be served. That it may not join issue eventually or is unlikely to join issue is not enough reason to exclude it from the proceedings altogether. That party should be joined in the proceedings and be allowed the latitude to decide where its interests, if any lie – whether to join issue or not to.

[19] Another issue that works against the applicant in this regard is that Mr. Muhongo argued that the parties whom the respondents claim should be joined on account of their interests in this matter were not before the Review Panel. Whilst that may be correct, the truth of the matter, as argued by Mr. Heathcote, is that the relief sought by the applicant before the Review Panel is different from that sought in the current matter.

[20] In the former, the applicant sought an order suspending the order of the Chairperson of the Procurement Management Unit selecting Supra for the award. The applicant further sought an order reviewing and setting aside the decision of Chairperson of the Procurement Management Unit, the Minister of Health and Social Welfare and the Executive Director of the Ministry dated 24 June 2020, regarding the receipt, consideration and selection for award of Supra. The applicant further sought the setting aside of the decision taken by the Government respondents dated 14 February 2020 by the Procurement Management Unit receiving and considering Supra's tender bid.

[21] It is clear from what is mentioned in the immediately preceding paragraph that not only were the parties cited as respondents different to some extent, but the orders sought and the dates thereof are different. In the current application, for instance, the order sought to be reviewed is that of the Review Panel and it is dated 2 September 2020. None of the prayers before the Review Panel implicated the decision dated 2 September 2020.

[22] I am of the considered view that notwithstanding the change in the legislative regime, ushered in 2015 by the Act, the legal question as to whether a party is a necessary party has not changed. It remains one to be determined on the particular facts of the matter. In the instant case, it appears to me that Mr. Heathcote is correct. If the other unsuccessful bidders have a direct and substantial interest, it is in respect of all the proceedings, including the interim relief sought as this has a direct bearing on the relief of review.

[23] I accordingly incline to the view and hereby endorse the finding by Ndauendapo J that in such matters, all the unsuccessful tenderers do have a direct and substantial interest in any order the court might make in relation to the tender. Entities who may have been disqualified in the process and did not make it to final lap, may fall into a different category.

[24] To view the two types of relief sought by the applicant in isolation may have deleterious consequences for the unsuccessful bidders. If a bidder has a right to be joined in the review, is it fair that they should be denied the opportunity and right to add their weight or not in the application for the granting of interim relief? I think not. If a party has a right to be party to the review proper, it certainly has a right to the granting of the interim relief, which in any event has an umbilical connection and decisive bearing on the application for review.

[25] To a large extent, the hearing of the main review is contingent on the application for an interim interdict succeeding. I say so for the reason that if the application for the granting of an interim relief is refused, that may render the review moot. I say so for the reason that if the interim relief is refused, and I must not be understood to be making any judgment thereon at this stage, there may be nothing standing in the way of the Ministry awarding the tender to Supra. The result would be that by the time the review proper is heard, the horses may have already have bolted, thus rendering the matter moot.

Conclusion

[26] In view of the discussion above, I have come to the ineluctable conclusion that this is a case in which the respondents are eminently correct on the law. It appears to me that the parties who were unsuccessful bidders for the tender do have a direct and substantial interest in any order this court might make, including that of interim relief. They are known to the applicant and there is no indication that they have waived their right to be joined to the proceedings. Their right to be joined may not be postponed to the hearing of the main review, as I have indicated above.

[27] The conclusion above impels me towards one conclusion and one conclusion only, and it is that the respondents have made out a good case. The unsuccessful tenderers have a direct and substantial interest and have to be joined as parties to the application.

Developments

[28] After delivering the ruling on the morning of 6 October, 2020, I intimated to the parties that a timetable for the joinder and service of the relevant interested parties should be worked on, together with the filing of the necessary papers. As I had an opposed motion ready for hearing, I granted the parties the opportunity to make proposals to the court for the further handing of the matter.

[29] Later in the day, i.e. 6 October 20120, the applicant filed a notice of withdrawal of both Parts A and B of the application and tendered costs. In view of the withdrawal, it becomes unnecessary to postpone the matter any further.

Order

[30] The following order should accordingly follow:

1. The point of law *in limine* of non-joinder of necessary parties by the Applicant succeeds.

2. The Applicant is ordered to pay the costs of the joinder application, together with costs occasioned by the withdrawal of the application, consequent upon the employment of one instructing and two instructed Counsel, where employed.
3. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku

Judge

APPEARANCES:

APPLICANT T. Muhongo (with him G. Kasper)
Instructed by: Murorua Kurtz Kasper Incorporated (MKK Inc)

2ND RESPONDENT: T. C. Phatela (with him N. Mutorwa)
Instructed by: Government Attorney

3RD RESPONDENT R. Heathcote (with him, N. Bassingthwaite)
Instructed by: Brockerhoff & Associates Legal Practitioners