



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00321

In the matter between:

PIS SECURITY SERVICES CC

APPLICANT

and

CHAIRPERSON OF THE CENTRAL

1st RESPONDENT

PROCUREMENT BOARD OF NAMIBIA

THE CENTRAL PROCUREMENT BOARD

2nd RESPONDENT

THE REVIEW PANEL

3rd RESPONDENT

NAMIBIA UNIVERSITY OF SCIENCE AND

4th RESPONDENT

TECHNOLOGY

NAMIBIA PROTECTION SERVICES (PTY) LTD

5th RESPONDENT

SECURITY TRAINING COLLEGE OF NAMIBIA

6th RESPONDENT

OMLE SECURITY SERVICES CC

7th RESPONDENT

SHIKUVULE TRADING CC

8th RESPONDENT

TRIPPLE ONE INVESTMENT CC

9th RESPONDENT

ONGWEDIVA SECURITY SERVICES CC

10th RESPONDENT

SPARK SECURITY SERVICES CC

11th RESPONDENT

SIX THOUSAND SECURITY SERVICES CC

12th RESPONDENT

SHILIMELA SECURITY AND DEBT COLLECTION CC

13th RESPONDENT

KAVIAMBO TRADING ENTREPRISES CC

14th RESPONDENT

SPLASH INVESTMENTS CC

15th RESPONDENT

WINDHOEK SECURITY SERVICES CC

16th RESPONDENT

NAMIBIA PEOPLES PROTECTION SERVICES CC

17th RESPONDENT

OMBANDJE SECURITY SERVICES CC	18th RESPONDENT
SHINE TECHNOLOGIES SOLUTIONS (PTY) LTD	19th RESPONDENT
BERTHA SECURITY SERVICES CC	20th RESPONDENT
THREE STARS SECURITY SERVICES CC	21th RESPONDENT
AMON SN INVESTMENT CC	22nd RESPONDENT
DEGRANDE INVESTMENT CC	23rd RESPONDENT

Neutral citation: *PIS Security Services CC v Chairperson of the Central Procurement Board of Namibia* (HC-MD-CIV-MOT-GEN-2020/00321) 113 [2021] NAHCMD (17 March 2021)

Coram: PARKER AJ
Heard: 3 March 2020
Delivered: 17 March 2021

Flynote: Practice – Judgments and orders – Suspension of orders pending appeal – Applicant seeking order in terms of rule 121 (2) of the rules of court that operation of and execution of order already granted not be suspended pending appeal – Court holding that applicant would be prejudiced in the enjoyment of its common law contractual rights and its constitutional right guaranteed to it by art 16 of the Namibian Constitution if operation and execution of the order were suspended – Order for operation and execution of order granted.

Summary: Practice – Judgments and orders – Suspension of order pending appeal – Applicant seeking order in terms of rule 121 (2) of the rules of court that operation of and execution of order already granted not be suspended pending appeal – Applicant as successful tenderer and fourth respondent as the employer entered in a contract for services – An earlier order confirmed applicant as successful tenderer – Fifth respondent as losing tenderer opposed the application – Court holding that applicant would be prejudiced in the enjoyment of its common law contractual rights and its constitutional right guaranteed to it by art 16 of the Namibian Constitution if operation and execution of the order were suspended – Consequently court granted the order to operate and execute order.

ORDER

1. The applicant's non-compliance with the requirements concerning forms and service of process is condoned and the matter is heard on the basis that it is urgent.
2. The order granted by the court (per Schimming-Chase AJ) under case no. HC-MD-CIV-GEN-2020/00321 be carried into operation and execution with immediate effect.
3. The fifth respondent shall pay applicant's costs of suit, including costs of one instructing counsel and one instructed counsel.
4. The matter is considered finalised and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] This matter was argued at length and extensively. On the papers and considering the relief sought by the applicant, I find that the determination of the application turns on a very short and narrow compass. What is before the court is a nice, straightforward prayer by the applicant: The applicant prays the court to order the operation and execution of the order of the court (per Schimming-Chase AJ) granted on 17 November 2020 ('the 17 November 2020 Order'), despite the noting of an appeal therefrom by fifth respondent. It is important to note at the threshold that the reasons for the Order were delivered on 18 January 2021. The significance of this fact will become apparent in due course. It is only the fifth respondent who has moved to reject the application.

[2] As a prelude to this judgment, I cannot do any better than to rehearse the background to the case and facts that the court found to exist in the reasons for the 17 November 2020 Order:

[1] The applicant in this matter (also applicant in the instant proceedings) (on an urgent basis) seeks final relief, namely an order that the decision taken by the third respondent on 10 August 2020 in respect of Bid No NCS/ONB/CPBN/01/2019, is (be) reviewed and set aside.

The parties

[2] The applicant is PIS Security Services CC ("PIS"), a close corporation duly established as such in terms of the applicable close corporation laws of the Republic of Namibia. As its main business, PIS provides security services to various entities, and was selected as the successful bidder (in Bid No NCS/ONB/CPBN/01/2019) to provide those services to the fourth respondent on 19 December 2019 and later on 21 July 2020 by the second respondent.

[3] The first respondent is the Chairperson of the Central Procurement Board of Namibia ("the Chairperson"), a juristic person established in terms of the provisions of sections 8 and 9 of the Public Procurement Act, 15 of 2015 ("the Act").

[4] The second respondent is the Central Procurement Board ("the Board"), a juristic person established in terms of the provisions of section 8 of the Act.

[5] The third respondent is the Review Panel a juristic person established in terms of the provisions of section 58 of the Act.

[6] The fourth respondent is the Namibia University of Science and Technology ("NUST"), a juristic person and tertiary institution established in terms of the provisions of section 2 of the Namibia University of Science and Technology Act, 7 of 2015. NUST was cited for the interest it has in the relief sought. No relief was sought against it and it abides the decision of the court.

[7] The fifth respondent is Namibia Protection Services (Pty) Ltd ("NPS"), a private company with limited liability duly registered and incorporated in accordance with the applicable company laws of the Republic of Namibia. NPS previously and at all material times provided

security services to NUST. It was one of the unsuccessful bidders in the bid under consideration. NPS continued to provide those services to NUST by separate contract until September 2020, and extended from time to time, pending finalisation of these proceedings.

'[8] ... The Review Panel initially opposed the matter through the Government Attorney. Given the position taken by the Board, the Review Panel could no longer be represented by the Government Attorney. Despite this, the Review Panel has made no effort to oppose this matter through different attorneys, or to file answering papers. Mr Luvindao, holding a watching brief, appears for NUST (the fourth respondent). Mr Heathcote SC, assisted by Mr Jacobs, appears for NPS.

'Background

'[9] This matter concerns a bid for the procurement of security services for NUST. As the cost estimate was above the applicable threshold, the Board conducted the bidding on NUST's behalf in terms of the Act. The bid was advertised on 5 August 2019 and closed on 3 September 2019. The bids were opened on 3 September 2019. PIS and NPS (the fifth respondent, who previously provided these services to NUST) participated in the bidding process together with other entities for the provision of the security services to NUST.

'[10] Subsequent to the evaluation of the bids and on 4 December 2019, the Board issued a Notice for Selection of Procurement Award ("the Notice"). The Notice was issued under signature of the Chairperson of the Procurement Board. It informed that PIS was the successful bidder for the provision of security services in terms of section 55 of the Act read with Regulation 38(1) of the Public Procurement Regulations.

'[11] In Part B of the Notice, unsuccessful bidders were informed that -

"...if you are not satisfied with the selection for the award made by the Central procurement Board of Namibia (CPBN) you may make an application for the review of the selection within seven (7) days of this notice and in the absence of an application for review the Accounting Officer of CPBN will award the contract to the person (s) selected for the award."

'[12] The 7-day period (referred to as "the standstill period") was formally expressed in the Notice to run from 11 December 2019 to 17 December 2019.

'[13] Following issue of the Notice, one of the unsuccessful bidders, Shilimela Security and Debt Collection CC ("Shilimela Security") and NPS applied for a review of the selection with the Board. It is common cause that Shilimela Security applied for review within the 7-day stand-still period, whilst the application of NPS was made outside the stand-still period prescribed by the Notice. Both unsuccessful bidders requested the Board to reconsider the selection of PIS as the preferred bidder.

'[14] During its meeting of 23 January 2020, the Board considered and declined both applications of Shilimela Security and NPS. The decision was transmitted to the affected bidders on 15 July 2020.

'[15] Following this decision and on 21 July 2020, the Board issued a "Notice of Award" (again under signature by the Chair) in terms of section 55(5) of the Act read with Regulation 39(1). In the terms of this Notice, bidders had a further 7 days (from 23 July 2020 to 29 July 2020) to approach the Review Panel, if they were still aggrieved with the decision of the Board.

'[16] After receipt of the Notice of Award, NPS approached the Review Panel in terms of section 59 of the Act. The Review Panel then heard the matter on 10 August 2020 and made the following decision:

"The Board failed to comply with Regulation 35 of the Regulations, in that the deadline for the bids to close was 29 days instead of the mandatory 30 days from the publication of the invitation to bid.

Non-compliance with section 52 of the Act – the Board used an evaluation criteria and methodology that was not set out in the bidding document. The evaluation of the bids was not completed in accordance with the criteria set out in the bidding document."

'[17] The Review Panel made an order that in accordance with section 60(f) of the Act, the procurement proceedings be terminated and start afresh.

'[18] PIS then requested the Review Panel for the reasons for its decision, but such reasons were not forthcoming.

'[19] Aggrieved by the decision, PIS launched this urgent application in terms of which it amongst other orders, sought an order:

“2. That the decision by the third respondent dated 10 August 2020 in respect of Bid No. NCS/ONB/CPBN/01/2019 be and is hereby reviewed and set aside and is declared null and void and of no force and effect.

3. That the decision by the first and second respondent dated 21 July 2020 in respect of Bid No. NCS/ONB/CPBN/01/2019 be and is hereby reviewed and corrected; by the removal and deletion of paragraphs 3 and 4 of the Notice of Procurement Award.

4. That it is hereby declared that regulation 38 (3) of the Public Procurement Regulations is *ultra-vires* sections 58 (1) (b) (i), 59 and 79 (1) (a) of the Public Procurement Act 15 of 2015 and is null and void and of no force and effect.”

‘[20] Notwithstanding the orders initially sought in the notice of motion, the applicant did not pursue all at the hearing, and restricted its relief on the merits to an order that the decision taken by the Review Panel in respect of Bid No NCS/ONB/CPBN/01/2019 be reviewed and set-aside and declared null and void and of no force (paragraph 2 of the notice of motion).’

[3] In the present proceedings, Mr Chibwana represents the applicant; Mr Jacobs represents the fifth respondent; Mr Luvindao represents the fourth respondent; and Mr Ncube represents the first, second and third respondents (‘the GRN respondents’). There is no appearance by the rest of the respondents.

[4] On the papers, in my view, the crucial question that screams for answer is this: Is there a valid contract of employment existing between the applicant (the successful tenderer, ie the employee) and the fourth respondent (i.e. the employer)? Indeed, the answer to this decisive question is pivotal to the determination of the present application, as I have said. The fifth respondent says there is no contract. The applicant says there is such employment contract; so, does the fourth respondent; and, *a fortiori*, the court (per Schimming-Chase AJ) found that such a contract exists. That being the case, I am bound to accept that finding of the court unless I think it was wrong; and I do not think it is wrong. (See *Chombo v Minister of Safety and Security* (I3883/2013) [2018] NAHCMD 37 (20 February 2018).)

[5] Accordingly, I conclude that a valid and enforceable contract of employment exists between applicant and fourth respondent. Applicant has, accordingly, acquired a right under the contract, i.e., right to property within the meaning of art 16 of the Namibian Constitution; for, property has been defined thus:

‘Property is that which belongs to a person exclusively of others, and can be the subject of bargain and sale. It includes goodwill, trademarks, licences to use a patent, book debts, options to purchase, life policies, and other rights under contract.’

[*Halsbury’s Laws of England*, 3rd ed, vol. 33, para 310, 311; *Shah v Attorney-General, Uganda* (1970) EALR at 523, quoted in Paul Sieghart, *The International Law of Human Rights* (1995) p 254]

[6] It follows that the word ‘property’ in art 16 of the Namibian Constitution includes a contract. That being the case, being the bastion for the protection of the rights guaranteed by the Namibian Constitution, the court must have a good reason to turn away the applicant from the seat of judgment of the court in the instant urgent application, unless it is found that applicant has not satisfied the requirements for urgency prescribed by r 73 (4) (a) and (b) of the rules of court.

[7] As to subrule (4) (a); in my view, proceedings to vindicate a constitutional right are prima facie urgent. An application to hear such matter on urgent basis can only be refused if the urgency is self-created in terms of subrule (4) (a) and under the authority of *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC).

[8] In the instant matter, the appeal to the Supreme Court was served on the applicant on 19 November 2020, even though the reasons for the order against which the appeal was noted was delivered on 18 January 2021, as I have said previously. The fact that fifth respondent, urged on, with respect, by intrepidity and rashness, noted the appeal before it even knew what reasons the court had in mind when it granted that order, does not mean that the court expects a similar unreasonable and hasty conduct by the applicant.

[9] In my view, a careful litigant, minded to act reasonably and with circumspection in the circumstances of the case, would do that which applicant did; that is, wait for the court's reasons for its 17 November 2020 Order – the very order against which the appeal was noted – before moving against the suspension of the operation and execution of that order by launching the present application, as it did, on 23 February 2021.

[10] Doubtless, the fact that this application has been argued strenuously by two capable counsel and reference made to a bevy of authorities, stretching from writings by Roman-Dutch law writers on important legal principles and the interpretation of statutory provisions, vindicates – in no small measure – the applicant for not having carelessly and rashly rushed into launching its application so soon after fifth respondent noted the appeal in the Supreme Court when, as I have said more than once, all the parties were in the dark as to the reasons for the very order against which fifth respondent had noted its appeal.

[11] Accordingly, I roundly reject Mr Jacob's submission that applicant should have brought its present application so soon after fifth respondent noted the appeal against the 17 November 2020 Order. In that regard, I take a great deal of counsel from the court's decision and reasons therefor in *Petronaft Intl v Minister of Mines & Energy* [2011] NAHCMD 125 on important considerations that the court ought to take into account in deciding whether the applicant has brought the application with speed and promptness.

[12] Moreover, if applications to suspend the operation and execution of orders when appeals have been noted against them are by their very nature urgent (see *Shoprite Namibia (Pty) Ltd v Paulo and Another* 2010 (Z) NR 475 (LC)), I see no good reason why applications for orders for the operation and execution of orders already granted should not, by a parity of reasoning, be by their very nature urgent, when appeals have been noted against them. Indeed, this must be more so in a case like the present matter where, as the applicant intimated in the founding papers, the suspension of the operation and execution of the order already granted will have the indubitable effect of denying not only the applicant (employee) but also

the fourth respondent (employer) their constitutional right and common law right to implement their employment contract.

[13] Furthermore, considering the nature of the right at stake here, I find that it is established that applicant could not be afforded substantial redress in due course in terms of r 73 (4) (b) of the rules of court.

[14] Based on the foregoing reasons, I find that applicant has satisfied the requirements prescribed by r 73 (4) of the rules of court. This conclusion disposes of fifth respondent's contention that the matter should not be heard on the basis that it is urgent.

[15] As to the merits, the burden of the court is to determine whether r 121 (2) of the rules of court should be allowed to prevent applicant from enjoying its contractual right at common law and its right to property guaranteed to it by art 16 of the Namibian Constitution. In that regard, I hold that some of the matters argued by counsel are irrelevant in the instant proceedings; and so, they do not deserve an intense treatment other than what I have said below thereanent.

[16] The first such matter is whether there has been a non-joinder of parties in the Supreme Court appeal that fifth respondent has noted: As a lower court to the Supreme Court, we should leave that to the Supreme Court and the Supreme Court Rules.

[17] The second is fifth respondent's allegation that applicant does not pay minimum wages to applicant's employees: For this court to accept that allegation in the instant proceedings as a good reason, in fifth respondent's view, for the court not to order the operation and execution of the court's Order of 17 November 2020, despite the noting of appeal, would be a travesty of justice of the highest order; plain and simple. It is not any place of this court in the instant proceedings to consider that allegation in any light. It is not the burden of this court in the instant proceedings to interpret and apply the Public Procurement Act 15 of 1995.

[18] The non-payment of minimum wages, by applicant, as fifth respondent alleges, could have been one of the relevant factors that the bodies which had the responsibility under Act 15 of 1995 to consider the tender to have taken into account. But it can never be a ground on which this court is entitled to stand on in determining whether or not the operation and execution of the court's Order of 17 November 2020 should be suspended in virtue of the noting of the appeal from that order. Mr Jacob's argument on the issue, which counsel was so much enamoured with, cannot assist fifth respondent. With respect, it has no merit or weight – none at all.

[19] As I have said more than once, the applicant has approached the court to order the operation and execution of the 20 November 2020 Order, despite the noting of an appeal therefrom. The fifth respondent moved to reject the application on the ground that fifth respondent has noted an appeal against the order, and it relies on r 121 (2) of the rules of court.

[20] In the most recent case of *Shoprite Namibia (Pty) Ltd v Namibia Food and Allied Workers Union and Others* case no. HC-MD-LAB-MOT-GEN-2021/00006 [2020] 5 NAHCMD (15 February 2021), I stated as follows on the interpretation and application of r 121 (2):

[17] ... The purpose of the rule (ie r 121(2) of the rules of court) is, as stated by Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A), this:

"It is today accepted common law rule of practice in courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal... 'the purpose of this rule as to suspension of a judgment on the noting of the appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment or in any other matter appropriate to the nature of the judgment appealed from."

[18] The use of the word "generally" by the court is instructive. It is a rule of procedure and is cast in general terms. It cannot be applied mechanically, overlooking considering the facts of the particular case without being a *reductio ad absurdum*. Take, for instance, a case where X institutes review proceedings to challenge X's unlawful arrest and

detention and torture while in such detention. The court reviews and sets aside the arrest, detention and torture on 8 January 2020. The respondent failed or refused to release **X** or desist from torturing **X**; and respondent notes an appeal against the judgment granted on 13 January 2020. Respondent argues, as does Mr Muhango, that the noting of the appeal has suspended the judgment. The upshot of this is that, in our illustration, respondent was at liberty to continue to detain **X** unlawful and torture her while she was in the unlawful detention, pending the appeal, because the judgment cannot be carried out and no effect can be given to it, except with the leave of the court that granted the judgment.

'[19] Doubtless, the rule maker did not intend such harsh and unlawful consequences. Indeed, this is an appropriate matter where the purpose of the rule ought to be taken into account in interpreting and applying r 121 (2) of the rules. As I have said, the purpose of the rule is to prevent irreparable damage from being done to the intending appellant.'

[21] In the instant matter, fifth respondent has not established what 'irreparable damage' will be done to fifth respondent and in what manner and in respect of what rights of fifth respondent's (see *Shoprite* para 19), if the operation and execution of the 20 November 2020 Order was not suspended. Doubtless, as Mr Chibwana submitted – and correctly so – fifth respondent has no enforceable right in consequence of the award of the tender to the applicant. It is rather the applicant, who, as the employee, has acquired a constitutional right in terms of art 16 of the Namibian Constitution thereby, and who will be greatly prejudiced in the enjoyment of its constitutionally guaranteed right under art. 16 of the Namibian Constitution; and what is more, fourth respondent (the employer) not only supports the relief sought by applicant, but it also urges the court that the 17 November 2020 Order should be 'carried into execution immediately'. The urging of the employer cannot be airbrushed. The fourth respondent is crying to the court to protect its rights under the contract.

[22] The fifth respondent, as I have intimated previously, shall suffer no prejudice – none at all – on account of the operation and execution of the court Order of 20 November 2020. When an act (or omission) is said to occasion prejudice or the likelihood of prejudice to **Mr X**, it presupposes that the act (or omission) has injured or is likely to injure **Mr X** in his right.

[23] Based on these reasons, I am satisfied that applicant on whom 'the overall onus of establishing a proper case for the grant of Leave to execute' the 17 November 2020 Order (see *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 at 546E) has discharged that onus. This court is, therefore, left in no doubt that this is an appropriate case for the grant of leave to execute (see *South Cape Corporation (Pty) Ltd*).

[24] In the result, in my judgment, the application succeeds; whereupon, I order as follows:

1. The applicant's non-compliance with the requirements concerning forms and service of process is condoned and the matter is heard on the basis that it is urgent.
2. The order granted by the court (per Schimming-Chase AJ) under case no. HC-MD-CIV-GEN-2020/00321 be carried into operation and execution with immediate effect.
3. The fifth respondent shall pay applicant's costs of suit, including costs of one instructing counsel and one instructed counsel.

4. The matter is considered finalised and is removed from the roll.

C Parker
Acting Judge

APPEARANCES

APPLICANT

T Chibwana

Instructed by Appolus Shimakeleni Lawyers
Windhoek1st AND 2nd RESPONDENTS

J Ncube

Of the Government Attorney
Windhoek4th RESPONDENT

T Luvindao

Of Dr Weder, Kauta & Hoveka Inc
Windhoek5th RESPONDENT

SJ Jacobs

Instructed by Koep & Partners
Windhoek