

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2021/00112

In the matter between:

SISTEMAS AVANZADOS DE TECNOLOGIA S.A (SATEC)

APPLICANT

and

**THE CHAIRMAN OF THE CENTRAL PROCUREMENT
BOARD OF NAMIBIA**

1ST RESPONDENT

THE CHAIRMAN OF THE REVIEW PANEL

2ND RESPONDENT

TELECOM NAMIBIA HOLDINGS (PTY) LTD

3RD RESPONDENT

**LEX TECHNOLOGIES (PTY) LTD AND INTEGRA
TOUCH LLC**

4TH RESPONDENT

**GREEN ENTERPRISE SOLUTIONS (PTY) LTD AND F.T.S
FORMULA TELECOM SOLUTIONS LTD JV**

5TH RESPONDENT

**INTEC TELECOM SYSTEMS SOUTH AFRICA (PTY)
LTD / CSG SYSTEM INTERNATIONAL**

6TH RESPONDENT

FORWARD-TELECOM LLC

7TH RESPONDENT

QUIVERSOFT CORPORATION CC

8TH RESPONDENT

**VEYA INFORMATION COMMUNICATION TECHNOLOGY
(PTY) LTD AND VERSO ALTIMA INDIA PRIVATE
LIMITED JV**

9TH RESPONDENT

**HUAWEI TELECOM COMMUNICATION TECHNOLOGIES
NAMIBIA (PTY) LTD**

10TH RESPONDENT

**BPI TECHNOLOGIES CC, VAS-X (PTY) LTD AND
1 INCEPTUM D.O.O.ZA USLUGE (PTY) LTD JV**

11TH RESPONDENT

SUNTIS SA / SUNTIS AG / SUNTIS LTD

12TH RESPONDENT

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|---|-----------------------------|
| MIND CTI LTD | 13 TH RESPONDENT |
| FOCUS TELECOM COMMUNICATION SOLUTION (PTY) LTD AND TELCOVAS SOLUTIONS AND SERVICES LTD JV | 14 TH RESPONDENT |
| CERILLION TECHNOLOGIES LTD | 15 TH RESPONDENT |
| BEIJING CSSCA TECHNOLOGIES CO LTD AND ASIAINFO INTERNATIONAL PTE LTD JV | 16 TH RESPONDENT |
| VIRTUA TECHNOLOGIES (PTY) LTD AND VANRISE SOLUTIONS S.A.L JV | 17 TH RESPONDENT |
| OKA INVESTMENTS (PTY) LTD | 18 TH RESPONDENT |
| SIX DEE TELECOM SOLUTIONS (PTY) LTD | 19 TH RESPONDENT |
| TECNOTREE CORPORATION | 20 TH RESPONDENT |
| THE ATTORNEY GENERAL | 21 ST RESPONDENT |
| THE MINISTER OF FINANCE | 22 ND RESPONDENT |

Neutral citation: *Sistemas Avanzados De Tecnologia S.A (SATEC) v The Chairman of the Central Procurement Board of Namibia* (HC-MD-CIV-MOT-GEN-2021/00112) [2021] NAHCMD 175 (19 April 2021)

Coram: ANGULA DJP

Heard: 16 April 2021

Delivered: 19 April 2021

Flynote: Motions and Applications – Urgent application – Rule 73(4) an applicant in an application for urgency is to satisfy the court in his or her founding affidavit with – Firstly, explicit exposition of circumstances which render the matter urgent – Secondly, reasons why he or she claims that there would be no substantial redress in due course – These two requirements require to be satisfied even in matters of commercial urgency.

Summary: This is an urgent application wherein the applicant seeks the following relief: in Part A of the notice of motion, the applicant seeks an order: reviewing and setting aside the decision of the Review Panel Board taken on 4 March 2021 which dismissed the applicant’s review application on account that it had been filed outside the seven days period stipulated by the rules; in the alternative, an order reviewing

and setting aside the CPBN decision to cancel the bidding process and an order referring back the review application to the Review Panel Board for consideration on the merits; in the further alternative, should the court not be amenable to grant the aforementioned relief, the applicant seeks an interim interdict preventing Telecom and the CPBN to re-advertise the bid or to conduct a direct procurement process; and an interim order preventing the Minister of Finance from granting an exemption to Telecom to deal with the bid itself.

The background facts upon which the above order are sought are set out below in the body of the ruling. It would suffice to state that the dispute concerned an international bidding for the supply of a business support system to Telecom. The bidding was cancelled by the Central Procurement Board of Namibia acting as an agent for Telecom. The applicant was aggrieved by such cancellation.

Held that the applicant failed to satisfy the two requirements of rule 73(4) that the matter was urgent.

Accordingly, the application was struck from the roll with costs.

ORDER

1. The application is struck from the roll for lack of urgency.
2. The applicant is to pay the costs of the first respondent and third respondent and in both instances, the costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and regarded finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] The crux issue for decision in this matter is whether the applicant has made out a case that the matter is urgent and as a result that its non-compliance with forms and services as provided for by the rules of this court be condoned. The applicant contends that it has made out a case for urgency whereas the first and third respondents contend that no case for urgency has been made out in the papers.

Factual background

[2] The matter concerns an international tender which was called by the first respondent, the Central Procurement Board of Namibia (CPBN), acting as an agent for the third respondent, Telecom, for the supply of delivery, installation, commissioning and maintenance of operation and business support system to Telecom. Eighteen bids were submitted. The bids were opened on 21 September 2020. Thereafter SATEC was invited by the CPBN to conduct a system demonstration which it did on 3 and 4 December 2020. Thereafter, CPBN decided on 4 February 2021 to cancel the bid. A notice to that effect was sent to the bidders and received by SATEC on 12 February 2021.

[3] Aggrieved by the cancellation of the bid SATEC sought legal advice. It was advised to file an application to the Review Panel Board. The review application was filed with the said board on 23 February 2021. The Review Panel Board held that the application for review was not filed within seven (7) days as prescribed by the regulations. Accordingly, the application was struck from the board's roll on 4 March 2021.

[4] Thence, SATEC embarked on preparing this application which was issued and served on 31 March 2021. The relief sought in the notice of motion as it stands now can be paraphrased as follows: In Part A of the notice of motion, the applicant seeks an order:

- (a) To review and setting aside the decision of the Review Panel Board taken on 4 March 2021, which dismissed the applicant's review application on account that it had been filed outside the seven days period stipulated by the rules;
- (b) In the alternative, the applicant seeks an order reviewing and setting aside the CPBN decision to cancel the bidding process and an order referring back the review application to the Review Panel Board for consideration on the merits;
- (c) In the further alternative, should the court not be amenable to grant the aforementioned relief, the applicant seeks an interim interdict preventing Telecom and the CPBN to re-advertise the bid or to conduct a direct procurement process; and
- (d) An interim order preventing the Minister of Finance from granting an exemption to Telecom to deal with the bid itself.

[5] As regards the relief sought, it is now common cause that the Review Panel Board has no jurisdiction to consider the review application because it did not concern an award of a procurement contract. Accordingly, the relief sought in this regard before this court, would serve no practical purpose for the applicant as the Review Panel Board has no jurisdiction even if the an order were to made to refer the application back to the Review Panel Board. It is further common cause that the minister has in the meantime granted exemption to Telecom on 31 March 2021 to conduct a private bidding process outside the realm of the CPBN. It follows therefore that in respect of this relief sought, the stables have been locked after the horses have already bolted. This relief is not capable of being granted.

[6] It would thus appear to me that the only order which is capable of being considered and granted is an order interdicting Telecom from conducting a direct procurement process. Does that require an urgent interim interdict order?

Determination

[7] This court is satisfied that the applicant and its legal representatives acted with the necessary haste to bring the application as soon as it was practically possible. I do also not hold it against the applicant or its legal representatives that it was wrongly advised to direct its application to the Review Panel Board which step wasted its valuable time to launch the present application. We, as human beings remain fallible and after all law, is not a discipline of precision as a science. The applicability of that route taken by the applicant in that regard appears to be less than settled; parties and lawyers who practise in that field appear to hold different views. This appears from the view held by the CPBN, the implementer and administrator of the Act, at the time when the applicant's review application served before the Review Panel Board.

[8] Rule 73(4) requires an applicant who seeks to have his or her application heard as a matter of urgency to explicitly set out the circumstances which render the matter urgent; and to state the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. Both requirements must be satisfied – satisfying one requirement only would not be compliant with the rule.¹

[9] The general approach to an urgent application is that it is assumed that the applicant's case is a good one. In the present matter as it will become evident later in this ruling, this assumption is compromised because of the intervening development since the launching of the application by the applicant. For instance, certain orders initially sought by the applicant can no longer be granted. In this regard, an amended notice of motion has been filed. That notice has not, as of yet served before this court. It would therefore not be appropriate for this court to refer to the proposed amendments to the notice of motion.

[10] The applicant has set out in detail, the steps taken to bring the application. I have already stated that I accept the explanation. As regards 'the circumstances' which render the matter urgent, the deponent to the applicant's founding affidavit states that urgency is supported by the scheme of the Act, which requires challenges to the decisions of the CPBN to be made within seven (7) days. The review Panel Board is required to give its decision not later than 14 days after the application is heard. The deponent then reasoned that in imposing these time limits, the legislature

¹ *Nghiimbwasha v Minister of Justice* (A 38/2015) [2015] NAHCMD 67 (20 March 2015) para [11].

wanted to ensure that public procurement is not delayed for a long period of time. Furthermore, if the relief claimed is not granted, Telecom will proceed with direct procurement or to re-advertise the bid to the prejudice of SATEC in that SATEC will have to participate in a bidding process for a third time and may compete unfairly against bidders who may be in possession of its bid. I should mention that according to the applicant, it previously submitted a bid to Telecom which was again cancelled.

[11] In my view, the fact that the Act stipulates time limits relating to the work of the Review Panel Board does not make the applicant's case urgent. The applicant is required to explicitly state what makes its case urgent. Furthermore, in my view the fact that Telecom might embark on direct procurement does not render the matter urgent. Chances are that Telecom might approach the applicant directly given the fact that it was invited to make a demonstration of its product before the CPBN. It would further appear that now that Telecom has been given the right to conduct a direct procurement, that situation might favour the applicant in view of the fact that it had been previously submitted a bid to Telecom. As regards the possibility of prejudice which the applicant might suffer if Telecom were to re-advertise the bid, the fear of prejudice is, in my view, speculative as it is based on the possibility that other bidders might be in possession of its bid. The applicant does not say how its bid could have landed in the possession of other bidders.

[12] In any event, I consider it highly improbable that Telecom would proceed with the private procurement process while the applicant's application is before court, filed in the normal course and not on urgent basis. I say so for the reason that it would be reckless for Telecom to do so.

[13] Having regard to the foregoing, I am not satisfied that the applicant has satisfied the first requirement for urgency. I turn to consider whether the applicant has satisfied the second requirement.

[14] As mentioned earlier, in respect of this requirement, the applicant is to explicitly state the reasons why it claims it could not be afforded substantial redress in due course. From the applicant's founding affidavit, I could identify the applicant's attempt to meet this requirement set out in para 129 of its affidavit. It reasons that:

'If a bona fide third party is awarded the contract through a direct procurement process without it being aware of this dispute, the third party will be protected and the only relief which SATEC will have, if found that there is irregularity, is to claim damages against Telecom. Dealing with this matter urgently, is also beneficial to Telecom and will protect the public purse because any damages which Telecom will have to pay will come from public funds. This demonstrates that SATEC will not secure substantial relief in due course unless the relief sought is granted.'

[15] Counsel were in agreement that commercial disputes may be heard on urgent basis. They were further in agreement that a tender bidding exercise is a commercial undertaking. In this connection, I associated myself with the holding in *Bank of Namibia v Small & Medium Enterprises Bank Limited and 6 Others*² where it was held in para [30] that:

'[30] Commercial urgency is well recognized in our courts, provided that the commercial urgency is sufficient to invoke rule 73. It does not, however, not follow as a matter of course that just because the matter is one of commercial nature it would entitle the applicant to have its matter treated on an urgent basis. The fact that irreparable damages may be suffered is not enough to make a case for urgency.'

[16] In this matter it is not the applicant's case that it will suffer irreparable damages or harm if the matter is not heard as one of urgency. The applicant's case is that it could not be afforded substantial redress in due course. In my judgment, the applicant has acknowledged that it will be afforded redress in due course in the form a claim for damages against Telecom if it is later discovered that the tender process was marred by irregularities. That concession shows that the applicant has failed to meet the requirement in rule 73(4)(b), because it can be granted substantial redress in due course, in the form of damages.

[17] In my view the fact that Telecom may be ordered to pay damages to the applicant does not make the matter urgent. In my view the damages, if proved, will be the same whether the irregularities are discovered now or years later. In any event it is not for the applicant to determine what is beneficial to Telecom and what is not beneficial to Telecom. Counsel for the first respondent correctly pointed out in

² *Bank of Namibia v Small & Medium Enterprises Bank Limited and 6 Others* [2017] NAHCMD 187 (10 July 2017).

this connection that the applicant does not allege that its business will come to stand still should this application not be heard on urgent basis, nor that it would suffer loss of revenue. It is for this reason that I am of the considered view that the case for urgency has not been made out.

Order

[18] I hereby make the following order:

1. The application is struck from the roll for lack of urgency.
2. The applicant is to pay the costs of the first respondent and third respondent and in both instances, the costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and regarded finalised.

H Angula
Deputy Judge -President

APPEARANCES:

APPLICANT: R HEATHCOTE SC (with him N BASSINGTHWAIGHTE)
Instructed by Brockerhoff & Associates, Windhoek

FIRST RESPONDENT: T CHIBWANA (with him H R KETJIJERE)
Instructed by Office of the Government Attorney,
Windhoek

SECOND RESPONDENT: S NAMANDJE (with him T IILEKA-AMUPANDA)
Of Sisa Namandje & Co. Inc., Windhoek