

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA
MAIN DIVISION, WINDHOEK
PRACTICE DIRECTION 61

Case Title: EYAMBEKO NAMIBIA CATERING SERVICES (PTY) LTD versus THE CHAIRPERSON OF THE CENTRAL PROCUREMENT BOARD OF NAMIBIA AND 48 OTHERS	Case No: HC-MD-CIV-ACT-OTH-2023/00497
	Division of Court: (MAIN DIVISION)
Heard before: CLAASEN J	Date of hearing: 13 November 2023
	Date of order: 04 December 2023
NEUTRAL CITATION: <i>Eyambeko Namibia Catering Services (Pty) Ltd v Chairperson Of The Central Procurement Board of Namibia</i> (HC-MD-CIV-ACT-OTH-2023/00497) [2023] NAHCMD 790 (4 December 2023)	
ORDER	
1. The application is struck from the roll for lack of urgency. 2. The applicant must pay the costs of the first, second, third, fifth and sixth respondents, including those of instructed counsel, where so employed.	
Reasons:	

Claasen J

Introduction

[1] This is an application for urgent relief for an interim interdict. The relief prayed for was divided into two parts. Under part A of the application, the applicant seeks orders in the following terms:

1. Condoning the non-compliance with forms and service provided for by the rules of court and hearing the matter urgently;
2. The first and second respondent be interdicted from implementing an award and conclusion of any procurement contracts with respect to Lots 6, 7, 8 and 13 under procurement reference number: G/OAB/CPBN-01/2022, in terms of which any of the decisions sought to be reviewed in part B hereof being the decision which forms the subject of the relief in paragraphs 6, 7, 8, and 9 below.
3. The fifth respondent is interdicted from executing any works in respect of Lots 6 and 7 under procurement reference number G/OAB/CPBN-01/2022.
4. The sixth respondent is interdicted from executing any works in respect of Lot 1 under procurement reference number G/OAB/CPBN-01/2022.
5. Orders 1- 4 shall operate as an interim order with immediate effect pending the final relief sought under part B of the applicant's Notice of Motion.

[2] Part B of the Notice of Motion sets out prayers for the review and setting aside of the decision made by the first and third respondents respectively, for contracts concluded for lots 6,7,8 and 13, to be declared null and void and for the matter to be remitted to the first respondent for re-evaluation.

Background

[3] The application centres around tender bids to supply meals to health centres in Namibia in accordance with the dietary needs of the patients. The applicant was one of the bidders. The applicant asserts that he submitted his bid on 26 May 2022. On 23 August 2023 he was notified by the Bid Evaluation Committee that his bid was disqualified for having failed to initial certain specified documents. The list referred to 6

different documents.

[4] Aggrieved by that, the applicant applied on 22 August 2023 for a reconsideration on the decision to disqualify it from the bidding process. On 30 August 2023 the applicant was notified that its application for reconsideration was submitted to the Board of the first respondent. That application was not successful and the first respondent stood firm in its decision that the applicant was correctly disqualified.

[5] As a result, the applicant approached the Review Panel on 28 September 2023 for hearing of the review application. On 13 October 2023 the applicant was informed that not only did the Review Panel dismiss its application, it also confirmed the first respondent's decision to make awards. It is the decision of the third respondent that the applicant now seeks to set aside. Additionally, to restrain the first and second applicants from implementation of the awards as well as to interdict the fifth and sixth respondents from executing work in respect of the lots awarded to them.

[6] The application was opposed by the first to the third respondents as well as the fifth and sixth respondents. These respondents set out their defences respectively all challenging that the applicant does not meet the various requirements for an interim interdict as well as urgency. In addition the fifth respondent also raised certain points of law.

Urgency

[7] True to its nature, in urgent applications the court cannot proceed to the merits unless it deals and finds urgency. In *Bank Windhoek Ltd v Mofuka and Another*,¹ the Namibian Supreme Court found that a court seized with an urgent application must recognise that the basic principle of rule 73(4) of the High Court Rules requires that it first decides whether a case had been made for the matter to be dealt with on an urgent basis before it deals with, or pronounces itself, on the main issue. It commits an irregularity that will be set aside on appeal if it does not follow this sequence. Only after a case of urgency has been made out could it condone the non-compliance with the rules and

¹ *Bank Windhoek Ltd v Mofuka and Another* 2018 (2) NR 503 (SC) para 15; See also *Amushelelo v The Magistrate, Windhoek* (HC-MD-CIV-MOT-REV-2019/00397) [2019] NAHCMD 475 (08 November 2019) para 13.

allow an applicant to jump the queue. Otherwise, the applicant should wait for its turn in the ordinary course.

[8] As such, that is where I turn to next. Rule 73(4) reads as follows:

‘In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –

- (a) the circumstances which he or she avers render the matter urgent; and
- (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.’

[9] Having considered the founding affidavit, I searched in vain under the heading of ‘Urgency’ in the founding affidavit for the jurisdictional requirements to have the applicant jump the queue. The averments² that the deponent makes do not meet muster. What the applicant says therein is that if an interim interdict, is not granted the procurement contracts in respect of the affected lots are likely to have been awarded, and it is clear that it will not receive substantial redress in due course and that it stands to suffer huge financial loss if an urgent interdict is not granted. There is nothing under that paragraph that set forth explicit facts to justify urgency on both elements of the test.

[10] The applicant seemed to have gone out of his way to address the requirements of an interdict and although that is necessary, it does not release it from the need to explicitly deal with the both requirements as stated in rule 73(4).

[11] The applicant asserts that there is a well-grounded apprehension of irreparable harm if the interdict is not granted. Although that is an element for an interdict, that in itself does not make an application urgent. In this regard I am in agreement with the sentiments express by Small AJ in *Keenjele v Kamanya*³ at para 12:

‘ In *Usakos Town Council v Jantze and Others*⁴ it was decided after referring to *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma (Pty) Ltd v Hypermarket (Pty) Ltd and Another*⁵ that the fact that irreparable damages may be suffered is not enough to

² Founding affidavit page 6-8.

³ *Keenjele v Kamanya* (HC-NLD-CIV-MOT-GEN-2021/00005) [2021] NAHCNLD 35 (6 April 2021) para 12.

⁴ *Usakos Town Council v Jantze and Others* 2016 (1) NR 240 (HC) in paragraph 20.

⁵ *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma (Pty) Ltd v Hypermarket (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 113E – 114B.

make out a case of urgency. The fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. The loss that applicant in such a case might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public.

[12] Therefore, I am not satisfied that the applicant has made out a proper case for urgency and thus concur with the respondents who raised lack of urgency upfront.

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

1. The application is struck from the roll for lack of urgency.
2. The applicant must pay the costs of the first, second, third, fifth and sixth respondents, including those of instructed counsel, where so employed.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
<p>Applicant</p> <p>R Heatcote SC, (with him S Jacobs) Intructed by Koep & Partners</p>	<p>Respondents</p> <p>First, second and third Respondent J Diedericks Instructed by Government Attorney</p> <p>Fifth Respondent</p> <p>S Namandje (with him E Nekwaya) Instructed by Sisa Namandje Inc.</p> <p>Sixth Respondent</p> <p>M Rukoro Instructed by J Tjizo</p>