**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-MOT-REV-2024/00038

In the matter between:

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| **AFRICURE PHARMACEUTICAL NAMIBIA (PTY) LTD** | **APPLICANT** |

and

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| **CHAIRPERSON OF THE CENTRAL PROCUREMENT BOARD OF NAMIBIA** | **FIRST RESPONDENT** |
| **MINISTER OF HEALTH AND SOCIAL SERVICES** | **SECOND RESPONDENT** |
| **ELEMENT MEDICAL SUPPLIERS (PTY) LTD** | **THIRD RESPONDENT** |
| **WINDHOEK MEDICAL SOLUTIONS (PTY) LTD** | **FOURTH RESPONDENT** |
| **SUPREMO PHAMACEUTICALS (PTY) LTD** | **FIFTH RESPONDENT** |
| **COSPHARM INVESTMENTS (PTY) LTD** | **SIXTH RESPONDENT** |
| **NEWMED PHARMACEUTICALS WHOLESALERS (PTY) LTD** | **SEVENTH RESPONDENT** |
| **HOODIA PHARMA (PTY) LTD** | |
| **JV GALEN SUPPLIES CC** | **EIGHTEENTH RESPONDENT** |
| **ADESSO HEALTHCARE CC** | **NINTH RESPONDENT** |
| **CORANCES INVESTMENTS (PTY) LTD** | **TENTH RESPONDENT** |
| **OKAALE PHARMACEUTICAL (PTY) LTD** | **ELEVENTH RESPONDENT** |
| **LIFESTYLE PHARMACEUTICAL WHOLESALERS** | **TWELFTH RESPONDENT** |
| **MINISTER OF FINANCE** | **THIRTEENTH RESPONDENT** |
| **STRATEGIC PARTNERS CC** | **FOURTEENTH RESPONDENT** |

**AFRIPHARMA INVESTMENTS (PTY) LTD** **FIFTEENTH RESPONDENT**
**BEYOND PHARMACEUTICALS (PTY) LTD** **SIXTEENTH RESPONDENT**
**NAMPHARM (PTY) LTD** **SEVENTEENTH RESPONDENT**
**CHAIRPERSON OF THE REVIEW PANEL** **EIGHTEENTH RESPONDENT**

**Neutral citation:** *Africure Pharmaceutical Namibia (Pty) Ltd v Chairperson of the Central Procurement Board of Namibia* (HC-MD-CIV-MOT-REV-2024/00038) [2024] NAHCMD 165 (12 April 2024)

**Coram:** MILLER AJ
**Heard**: **22 February 2024**
**Delivered**: **28 February 2024**
**Released:** **12 April 2024**

**Flynote:** Practice – Applications and motions – Urgency – High Court Rule 73(4) – High Court Rule 73(4) – provisions peremptory – Interim interdict – Requirements are well established – Defective papers – Urgency self-created.

**Summary:** Practice – Applications and motions – Urgency – Applicant filing urgent application to challenge by review decision of the Central Procurement Board of Namibia in a tender process– Second Respondent applying the directive preferential procurement – Applicant failing to seek clarity on why the decision was made not to apply the directive in respect of the procurement in respect of which the tenders were issued and opting to submit bids despite the knowledge that the directive would not apply.

*Held,* that the applicant failed to satisfy the first requirement that had to be met in order for me to hear the matter on the basis of urgency and the application is struck from the roll for lack of urgency.

*Held,* that the urgency was self-created in that the applicant, aware of the fact that the directive was not going to be applied, participated in the process, allowed the tender process to run its course, and only approached the court some years later, when it was dissatisfied with the award that was made to it.

## ORDER

1. The application is struck from the roll for lack of urgency.

2. The Applicant must pay the costs of the Respondents who opposed the application including the costs of one instructing and one instructed counsel in respect of the first, second and thirteenth Respondents, one instructing and two instructed counsels in respect of the fourth Respondent, and one instructing and one instructed counsel in respect of the eighteenth Respondent. Such costs must include the costs occasioned by previous postponements, which the court directed would be determined at the hearing.

3. The matter is removed from the roll and regarded as finalised.

## JUDGMENT

MILLER AJ:

[1] By notice of motion dated 5 February 2024, the applicant instituted proceedings against the first to thirteenth respondents in which it claimed certain relief divided into Parts A and B of the Notice of Motion. In Part A of the Notice of Motion what the applicant essentially seeks is an interim interdict in terms whereof the first and second respondents are interdicted and restraint from implementing or executing any procurement contract awarded to and or entered into with any other successful bidders including the applicant self, in respect of Tender G/ONB/CPBN-01/2022. I will refer to this document simply as the Tender.

[2] The interim relief is being sought pending the finalization of the relief claimed in Part B of the Notice of Motion. Part B basically seeks an order reviewing and

setting aside the first respondents' decision to issue a Notice of Procurement Award in respect of the tender.

[3] These proceedings do not essentially concern Part B of the Notice of Motion. The final determination of those particular prayers are best left for decision on another day, should the need arise. I need only say this in respect of Part B and that is that the main stay of the relief being sought in relation to Part B, is the failure on the part of the first respondent, when it first invited the tenders and subsequently awarded some, to not apply what is called the directive preferential procurement which is dated 14 December 2020. I will refer to this document simply as the directive. The fact that the first respondent had opted not to apply the directive in respect of the bids it called for was made known to the respective bidders including the applicant. That much is apparent from the bid document which was issued in October 2022.

[4] The applicant claims to be a local manufacturer of pharmaceutical products in respect of which tenders were called for. Being a local manufacturer, the decision not to apply the directive in respect of the applicant must have been of some importance to the applicant and had the potential at least to deprive it of whatever benefits it may have received in terms of the directive.

[5] It is common cause that the applicant was aware of the decision not to apply the directive since it is clearly and unequivocally spelt out in the bid documents which were issued in October 2022. One would have thought that the obvious course to follow would have been for the applicant to seek clarity on why the decision was made not to apply the directive in respect of the procurement in respect of which the tenders were issued. Depending on the nature of the response it is open to the applicant to take whatever steps it deemed necessary, if it considered itself dissatisfied by the response. That would have included pursuing further internal remedies or, if needs be, to approach this court for an appropriate order. As matters turned out, the applicant decided not to follow this course. Instead it opted to hedge its bets so to speak. Despite the knowledge that the directive would not apply in respect of the tenders, the applicant decided to submit bids for the procurement of the products in respect of which the tender was issued.

[6] The applicant only took steps once the decision and the announcement of the successful bidders were made public in due course in 2023. Although the application was lodged on 5 of February 2024, the hearing of the matter was delayed for a period of time mainly due to the fact that the applicant's papers were defective in the sense that not all the interested parties were joined. This necessitated a postponement on various occasions with the applicant opting in the end to join the fourteenth to the eighteenth respondents. As matters turned out the application could only be heard on 18 February 2024. Although the respondents claim that the delay has taken away the matter of urgency, it does not seem to be the case. Any prejudice that was suffered was likely to have been suffered as a result of the postponements, and can in my view adequately be met by appropriate cost orders adverse to the applicant.

[7] It is a fundamental principle of our law in relation to applications brought as a matter of urgency, that the applicant must satisfy the two requirements, especially where it seeks an interim interdict. Firstly, it must explicitly set out the reasons why the matter is urgent, and secondly, it must satisfy the court that if the interim interdict if not granted, it will suffer irreparable harm. As far as the first requirement is concerned, this court in the decision of *Bergmann v Commercial Bank (Pty) Ltd* reported as 2001 NR 48 held that:

'An applicant cannot rely on issues of urgency and allege that a matter is urgent in instances where any urgency is self-created. The decision has been cited with approval in a number of subsequent decisions and has never been questioned.'

[8] I was referred during the course of argument to a decision of the Supreme Court of Appeal in *South Africa, the matter of Airports Company South Africa SOC Ltd v Imperial Group Limited* 2020 (4) SA 17 (CA). The reasoning to be found in paragraphs 91 and 92 of that particular judgment bears a likeliness to the situation in the present case and the reasoning adopted by that court I find persuasive. The following portions are quoted from paragraphs 91 and 92 of the judgment in question:

'91. Furthermore such an attack is concerned with the decision to issue the tender invitations on those terms rather than the decisions made by the BE's and BA's. The

function of the BA's was to evaluate the tenders in accordance with tender documents. If an EC considered that the decision to go out to tender on terms which did not require some functionality to be scored was unlawful it should have lost a timeous challenge once the tenders were issued on 31 July 2020 and 7 August 2020 respectively. That a decision to issue a tender on terms which violated procurement legislation is in principle susceptible to judicial review is apparent from the judgment of the Supreme Court of Appeal in *Air Port South Africa*. But instead of challenging the decision to issue the tenders on supposedly objectionable terms, SME participated in the tenders allowed the tender evaluation process to run their course, internally appeal against decisions to reject.

92. In principle it seems undesirable that the bidder should be at liberty to take a chance in the hope that it will be awarded the tender, keeping in reserve an attack on the validity of the tender should it be unsuccessful in winning the bid'

[9] Much the same applies in the instant case. The applicant, aware of the fact that the directive was not going to be applied, participated in the process, allowed the tender process to run its course, and only approached the court some years later, when it was dissatisfied with the award that was made. In these circumstances it is apparent to me that it was was a self-created urgency. The fault lies at the door of the applicant itself. That being the case, it follows that the applicant fails to satisfy the first requirement that had to be met in order for me to hear the matter on the basis of urgency. In the result the following orders are made:

1. The application is struck from the roll for lack of urgency.

2. The Applicant must pay the costs of the Respondents who opposed the application including the costs of one instructing and one instructed counsel in respect of the first, second and thirteenth Respondents, one instructing and two instructed counsels in respect of the fourth Respondent, and one instructing and one instructed counsel in respect of the eighteenth Respondent. Such costs must include the costs occasioned by previous postponements, which the court directed would be determined at the hearing.

3. The matter is removed from the roll and regarded as finalised.

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PJ MILLER

Acting Judge

APPEARANCES:

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| APPLICANT: | T Chibwana<br>Instructed by Brockerhoff & Associates<br>Legal Practitioners, Windhoek |
| 1ST and 2ND RESPONDENTS: | J Diedericks<br>Instructed by Office of the Government<br>Attorney, Windhoek |
| 4TH RESPONDENT: | A Corbett SC<br>Instructed by Andreas-Hamunyela Legal<br>Practitioners, Windhoek |
| 18TH RESPONDENT: | M Ntinda<br>Instructed by Office of the Government,<br>Windhoek |