REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no.: HC-MD-CIV-MOT-REV-2024/00112

In the matter between:

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

and

CHAIRPERSON OF THE CENTRAL PROCUREMENT BOARD OF NAMIBIA (CPBN)	**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	**EIGHTH RESPONDENT**
ADESSO HEALTHCARE CC	**NINTH RESPONDENT**
CORANCES INVESTMENTS (PTY) LTD	**TENTH RESPONDENT**
OKAALE PHARMACEUTICAL (PTY) LTD	**ELEVENTH RESPONDENT**

LIFESTYLE PHARMACEUTICA WHOLESALERS **TWELFTH RESPONDENT**
MINISTER OF FINANCE **THIRTEENTH RESPONDENT**
STRATEGIC PARTNERS CC **FOURTENTH RESPONDENT**
AFRIPHARM INVESTMENTS (PTY) LTD **FIFTEENTH RESPONDENT**
BEYOND PHARMACEUTICALS (PTY) LTD **SIXTEENTH RESPONDENT**
NAMPHARM (PTY) LTD **SEVENTEENTH RESPONDENT**
CHAIRPERSON OF THE REVIEW PANEL **EIGHTEENTH RESPONDENT**
PHARMACY COUNCIL OF NAMIBIA **NINETEENTH RESPONDENT**

Neutral citation: *Africure Pharmaceutical Namibia (Pty) Ltd v Central Procurement Board of Namibia* (HC-MD-CIV-MOT-REV-2024/00112) [2024] NAHCMD 172 (16 April 2024)

Coram: SIBEYA J
Heard: **22 March 2024**
Delivered: **16 April 2024**

Flynote: Applications – Urgent application – Rule 73 – Public Procurement Act 15 of 2015 – Urgency must established – The threat of irreparable harm is not sufficient to establish urgency – Applicant failed to establish the urgency of the matter.

Summary: This application was brought to court on an urgent basis. The applicant filed an urgent application that was struck from the roll on 1 February 2024, for lack of service of the application on three of the respondents. The applicant brought another urgent application that was struck from the roll on 28 February 2024, for lack of urgency. The applicant then filed this application to be heard on urgency to stay the implementation of the tender and/or contract awarded to the successful bidders to supply pharmaceuticals pending the review that is yet to be amended.

The respondents opposed the urgent application and raised several points of law *in limine* including lack of urgency.

Held: that a party is not barred from launching a subsequent urgent application based on the same papers duly amplified where the application was unsuccessful for lack of urgency, provided that he or she can establish urgency.

Held that: it is permitted in our law for a party to seek an interim interdict pending review proceedings still to be instituted.

Held further that: the fact that a party may suffer irreparable damages is insufficient to make out a case for urgency.

Held: the applicant, in an attempt to prove urgency, failed to account for the period of 8 to 15 March 2024, and further failed to set out sufficient facts that render the application urgent.

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

ORDER

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1. The applicant's non-compliance with the Rules of this Court pertaining to time periods for service of the application, giving notice to parties and exchange of pleadings as contemplated in rule 73 of the Rules of this Court is refused and the application is struck from the roll for lack of urgency.

2. The applicant must pay the first, second, fourth and thirteen respondents' costs of opposing the application, such costs to include costs of one instructing and one instructed legal practitioner in respect of the first, second and thirteenth respondents, and costs of one instructing and two instructed legal practitioners in respect of the fourth respondent.

RULING

SIBEYA J:

Introduction

[1] The urgency of an application is not to be assumed but it is to be established on the facts of the matter. Self-created urgency does not render a matter urgent nor does it prove that an applicant may not be afforded substantial redress at a hearing in due course.

[2] The court is seized with an application brought on urgency for interim interdictory relief. The applicant seeks to interdict the first and second respondents from entering into contracts or executing the contracts with the successful bidders in respect of tender number: G/ONB-CPBN-01/2022, for the supply of pharmaceuticals, pending the review application in case number: HC-MD-CIV-MOT-REV-2024/00038.

[3] The application is opposed by the first, second, fourth and thirteenth respondents.

Parties and legal representation

[4] The applicant is Africure Pharmaceutical Namibia (Pty) Ltd, a company with limited liability duly registered according to the laws of the Republic, with its principal place of business situated at Erf 208, Gold Street, Unit 8, Prosperita, Windhoek.

[5] The first respondent is the Central Procurement Board of Namibia (CPBN), duly established as such in terms of the Public Procurement Act 15 of 2015 ('the Act'), with its address of service being the Office of the Government Attorney, 2nd Floor, Sanlam Centre Building, Independence Avenue, Windhoek.

[6] The second respondent is the Minister of Health and Social Services, duly appointed as such in terms of Article 32(3)(i)*(d)* of the Namibian Constitution and whose address of service is the Office of the Government Attorney, 2nd Floor, Sanlam Centre Building, Independence Avenue, Windhoek.

[7] As stated above, the third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth respondents did not oppose the application. The third, fifth to twelfth, and fourteenth to seventeenth respondents are close corporations or companies registered or incorporated in terms of the Close Corporation or company laws of the Republic, that submitted bids for the tender to supply pharmaceuticals under tender number: G/ONB-CPBN-01/2022.

[8] The fourth respondent is Windhoek Medical Solutions (Pty) Ltd, a company with limited liability duly registered in terms of the laws of the Republic, with its principal place of business situated at Unit 1, Pro Corp Park, Prosperita, Windhoek.

[9] The thirteenth respondent is the Minister of Finance, duly appointed in terms of Article 32(3)(i)*(d)* of the Namibian Constitution, whose address of service is the Office of the Government Attorney, 2nd Floor, Sanlam Centre Building, Independence Avenue, Windhoek.

[10] As stated hereinabove, only the first, second, fourth and thirteenth respondents opposed the application, therefore, where it becomes necessary to refer to the said respondents jointly, they shall be referred to as ‘the respondents’.

[11] The applicant is represented by Mr Chibwana, while the first, second and thirteenth respondents (‘the government respondents’) are represented by Mr Diedericks and the fourth respondent is represented by Mr Corbett.

Relief

[12] The applicant seeks the following orders:

'1 Condoning the Applicant's non-compliance with the rules of this Honourable Court related to forms and service and hearing this application on a urgent basis as envisaged by rule 73(3) of the High Court Rules.

2. That the First and Second Respondents be and are hereby interdicted from entering into a contract in respect of tender no. G/ONB-CPBN-01/2022 and or implementing and or executing a contract in respect of tender no. G/ONB-CPBN-01/2022 with any of the successful bidders pending the outcome of the review application in case number: HC-MD-CIV-MOT-REV-2024/00038.

3. That the First and Second Respondents be and are hereby interdicted from entering into a contract in respect of tender no. G/ONB-CPBN-01/2022 and or implementing and or executing a contract in respect of tender no. G/ONB-CPBN-01/2022 with the Fourth Respondent and any of the successful bidders that failed to provide a performance guarantee (performance security), as required by Section I – Instructions to Bidders ITB 40.2 and 41.1, by 29 February 2024 to the First Respondent pending the outcome of the review application in case number: HC-MD-CIV-MOT-REV-2024/00038.

4. Costs of one instructing and one instructed counsel in the event that this application is opposed.

5. Further and/or alternative relief.'

Background

[13] On 23 January 2024, the applicant launched an urgent application under case number: HC-MD-CIV-MOT-REV-2024/00023 seeking the same relief as in the present matter. The application was heard on 1 February 2024 by Parker AJ, and it was struck

from the roll with costs on the same day due to lack of service on three of the respondents.

[14] On 2 February 2024, the applicant re-launched the urgent application and sought an interim interdict order pending the finalisation of Part B of the application. This application was heard by Miller AJ on 22 February 2024 and was struck from the roll on 28 February 2024 for lack of urgency. The court found that the application should have been launched the moment that the bidding documents were issued and the applicant realised that the bidding documents did not contain a provision that invokes the local sourcing directive dated 14 December 2020. The applicant claims to be a local manufacturer of the antiretroviral products.

[15] The review record was filed on 14 and 15 March 2024. The applicant states that it intends to amend its notice of motion and file a supplementary founding affidavit, not pursuing the grounds for review relating to the applicability of the 14 December 2020 local sourcing directive.

[16] The applicant, proceeded to set out grounds on which it claims that its urgent application for interim interdictory relief pending the review application to be amended, can succeed. The review application was filed on 2 February 2024. The applicant claims, *inter alia*, that the performance agreement was not provided by the fourth respondent and that the fourth respondent misrepresented its address.

[17] The fourth respondent was issued with the award on 15 January 2024.

[18] The urgent application was filed on Friday, 15 March 2024 at around 19h36 and set down for hearing the next Friday, 22 March 2024. It was served on the government respondents on Monday, 18 March 2024, at 10h34 while the fourth respondent was served at 14h00.

Points *in limine*

[19] The respondents raised several points of law *in limine*. They content that the application launched by the applicant is not urgent. The fourth respondent continued to raise further points of law *in limine*, namely: that the nineteenth respondent, the Pharmacy Council of Namibia, is cited in this application for a relief *pendente lite,* yet it is not a party in the review application, and that the application is premature as the review grounds on which the applicant relies are still to be pleaded.

Urgency

[20] The government respondents contend that the present application is not urgent as the discrepancy in the address of the fourth respondent, alleged by the applicant, cannot render the matter urgent. The government respondents further stated that the complaint that the applicant raised regarding the extension to the bidder to provide security for the performance of the contract is raised by the applicant as a ground of urgency but not a ground of review. Mr Diedericks argued that the applicant's application ought to fail on urgency.

[21] The fourth respondent accepted the burton from the government respondents regarding the attack on the urgency of the application. The fourth respondent complains of the insufficient time afforded to it by the truncated dates provided for by the applicant to respond to the application particularly where the parties were already involved in litigation in the same matter. Mr Corbett argued that the certificate of urgency was signed on 15 March 2024, but the fourth respondent was only served on 18 March 2024, and instructed counsel only managed to take instructions on 20 March 2024. Answering papers were drafted on 21 March 2024, which happened to be a public holiday.

[22] Mr Corbett argued that the applicant failed to establish that this matter is urgent and he placed reliance on the decision of *Bergmann v Commercial Bank of Namibia Ltd*

and Another.[1] He further argued that, after all this, application was struck from the roll before for lack of urgency.

[23] Mr Chibwana, on his part, refused to be outdone. He argued that the application is urgent as the fact that it was struck from the roll before does not prevent the re-launching of the application on urgency. Mr Chibwana argued that the implementation of the tender is the basis for urgency. He submitted that: the fourth respondent was not registered with the Pharmacy Council of Namibia; it provided a false address; and should not have been awarded the tender. He further submitted that the applicant cannot be afforded substantial redress at a hearing in due course. This, he argued, rendered the application more urgent than before.

Analysis

[24] The applicant in an urgent application must satisfy rule 73(4) of the rules of this court. Rule 73(4) reads:

'(4) 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.'

[25] This court, in *Nkinda v The Municipal Council of the Municipality of Windhoek,*[2] at paras 10-11 remarked as follows regarding urgent applications:

'[10] Urgent applications are not a given as they interfere with the normal orderly arrangement of court rolls and get prioritized over already scheduled matters. It was accentuated in *Luna Meubel Vervaardigers v Makin and Another*[3] that:

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[1] *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC).
[2] *Nkinda v The Municipal Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-GEN-2019/00400) [2019] NAHCMD 446 (31 October 2023).
[3] *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) 136H.

"Urgency involved mainly the abridgement of times prescribed by the rules and secondarily, the departure from established filing and sitting times of court."

[11] Urgent applications therefore enjoy an unfair advantage which requires closer scrutiny by the court for the application to be sanctioned as one of urgency and to be accorded precedence over other cases.'

[26] In this matter, the applicant, in the founding affidavit deposed to by Mr Shapwa Tangeni Kanyama, its chairperson of the Board of Directors and shareholder, states that the documents on which it obtained information that the successful bidders did not provide performance guarantees by 29 February 2024, came to its attention from 8 March 2024 and finally on 15 March 2024. Mr Kanyama further deposed that the review record, in the review application, was filed on 14 and 15 March 2024.

[27] Mr Kanyama states further that it was only on 14 March 2024, that it came to the applicant's attention that the first respondent had not received the performance guarantees and that the fourth respondent did not operate at an address registered with the nineteenth respondent. He further contends that the 21 November 2023 directive also only came to the applicant's attention on 14 March 2024. Mr Chibwana submitted that the applicant is entitled, as a result, to obtain an interim interdict pending the review application to be amended.

[28] A refusal of an application for lack of urgency is no bar to the subsequent application for relief on urgency, on the same papers duly amplified, revealing the fact on which urgency is established.

[29] It is further part of our law that a party may seek an interim interdict on the basis of an application to be filed at a later stage. Mr Chibwana correctly placed heavy reliance on the decision of this court of *AFS Group Namibia (Pty) Ltd v Chairperson of the Tender Board of Namibia and others,*[4] where an urgent application instituted by an

[4] *AFS Group Namibia (Pty) Ltd v Chairperson of the Tender Board of Namibia and others* [2011] NAHC 184 (1 July 2011).

unsuccessful bidder on 12 April 2011, was refused for lack of urgency on 19 April 2011. On 27 May 2011, after the filing of a review record, the applicant filed a second review application, where the court remarked as follows at para 58:

'[58] I am of the view that the applicant could have acted with more haste in finalising this application, especially after the first application for interim relief was struck from the roll. However does this mean that there was culpable remissness or *mala fide* on the part of the applicant? In my view there is no culpable remissness or *mala fide*s, and the urgency is not self-created. The applicant did need to study the record, consult and prepare founding papers together with its legal representatives, as well as to consider legal advice…'

[30] In *Shetu Trading CC v Chair of the Tender Board of Namibia and Others,*[5] a second urgent application was launched pending review in order to prevent the respondents from taking further steps, after the first urgent application was refused for lack of urgency. The court found the second application to be urgent. The court stated that at this stage it had to assume that the applicant's case is strong, making the allegations of irregularities very strong, and therefore, making the application that seeks to stay the implementation of the irregular tender urgent.

[31] Although the respondents contended in their papers that the applicant is seeking an order *pendente lite* where there is no *lite*, I did not hear any of the respondents persist in oral argument that no interim interdict may be granted pending the review that is yet to be filed. Persistence with such argument would have been wrong in light of the above cited authorities. I, therefore, find that it is permitted in our law to seek an interim order, even on an urgent basis, pending a review application yet to be filed.

[32] In *casu*, an urgent application filed by the applicant was struck from the roll for lack of service on 1 February 2024, by Parker AJ. The applicant re-launched the urgent application which was struck for lack of urgency by Miller AJ on 28 February 2024. Undeterred, the applicant launched this third urgent application on 15 March 2024. The

[5] *Shetu Trading CC v Chair of the Tender Board of Namibia and Others* [2011] NAHC 179 (22 June 2011).

applicant states that the information which it relied on to establish urgency began to come to its attention on 8 March 2024 and finally on 15 March 2024. The applicant does not particularise what kind of information came to its attention on 8 March 2024. The applicant throws a blanket, as it were, on the dates of 8 to 15 March 2024, and leaves the court to second guess the events of 8 to 13 March 2024, in particular.

[33] This court in *Bergmann*[6] remarked that:

> 'When an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. Urgent applications should always be brought as far as practicable in terms of the Rules. The procedures contemplated in the Rules are designed, amongst others, to bring about procedural fairness in the ventilation and ultimate resolution of disputes.

[34] I hold the view that bundling the events of 8 to 15 March 2024, detaches flesh from the bones of the averments raised of particularity as required by rule 73(4). The applicant is required to take steps to invoke urgency as soon as practically possible after the cause has arisen. The applicant is further required to account for the period that passes after the cause arose, up to the filing of the urgent application. This, in my view, the applicant failed to do.

[35] The fact that in the present matter, the applicant launched a third urgent application, in my view, places the applicant under a radar to ascertain whether it is not unnecessarily burdening the respondents and the court with unwarranted urgent applications. As stated earlier, the refusal of an application on urgency by no means bars an applicant from instituting subsequent urgent applications. It, however, calls for scrutiny of the application to avoid the possible abuse of the process.

[36] The applicant mainly contends that if the interim interdict is not granted it will suffer irreparable harm.

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[6] *Bergmann (supra)* at p50.

[37] This court in *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others,*[7] remarked as follows at paras 19-20:

'[19] Rule 6(12) deals with urgent applications. It is trite that the court has a discretion in this regard, which also clearly appears from the wording of rule 6(12), which reads:
"6(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter in such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.
(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims that he or she could not be afforded substantial redress at a hearing in due course. . . .'
Rule 6(12)(b) makes it clear that the applicant must in his founding affidavit explicitly set out the circumstances upon which he or she relies that it is an urgent matter. Furthermore, the applicant has to provide reasons why he or she claims that he or she could not be afforded substantial address at the hearing in due course.
It has often been said in previous judgments of our courts that failure to provide reasons may be fatal to the application and that 'mere lip service' is not enough. (*Luna Meubel Vervaardigers v Makin and Another (t/a Makin's Furniture Manufacturers*) 1977 (4) SA 135 (W) at 137F; *Salt and Another v Smith* 1990 NR 87 (HC) at 88 (1991 (2) SA 186 (Nm) at 187D – G).

[20] The fact that irreparable damages may be suffered is not enough to make out a case of urgency. Although it may be a ground for an interdict, it does not make the application urgent. *(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.)'

[38] It is apparent from *Mweb (supra)*, a decision of the full bench of this court, that the fact that irreparable damages may be suffered is not a passport to render the application urgent. The applicant must still, nevertheless, prove the urgency of the

[7] *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC).

matter. In *casu,* I find that the applicant laid great store on the averments of irreparable harm in its claim for the urgency of the application. As said above, this is not enough.

[39] I further find that the issue of the alleged misrepresentation of the address of the fourth respondent was not established to render the application urgent. This is further premised on the basis that the address of the fourth respondent complained about is alleged not to be registered with the nineteenth respondent while the nineteenth respondent is not a party to the review application. The applicant further does not state that it intends to include the nineteenth respondent as a party in the intended amendment to the review application.

[40] In respect of the complaint about the performance guarantee, it is established from the papers the deadline to submit the performance guarantee was extended.

Conclusion

[41] In consideration of the above findings and conclusions, this court holds the view that the applicant failed to explicitly set out the circumstances that render this application urgent. The applicant, as a result, failed to prove that this matter should be heard as one of urgency. The court, thus, declines to exercise its discretion to hear this application on urgency.

Costs

[42] It is settled principle of law that costs follow the result unless established otherwise. In *casu*, no reason exists to depart from the said principle. The respondents will, therefore, be awarded costs, including costs of instructing and instructed legal practitioners engaged.

Order

[43] In view of the above, it is ordered that:

1. The applicants' non-compliance with the Rules of this Court pertaining to time periods for service of the application, giving notice to parties and exchange of pleadings as contemplated in rule 73 of the Rules of this Court is refused and the application is struck from the roll for lack of urgency.

2. The applicant must pay the first, second, fourth and thirteen respondents' costs of opposing the application, such costs to include costs of one instructing and one instructed legal practitioner in respect of the first, second and thirteenth respondents, and costs of one instructing and two instructed legal practitioners in respect of the fourth respondent.

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O S Sibeya

Judge

APPEARANCES

APPLICANT:	T Chibwana Instructed by Brockerhoff and Associates Legal Practitioner, Windhoek
FIRST, SECOND AND THIRTEEN RESPONDENTS:	J Diedericks Instructed by the Office of the Government Attorney, Windhoek
FOURTH RESPONDENT:	A Corbett SC, assisted by E Nekwaya Instructed by Andreas-Hamunyela Legal Practitioenrs, Windhoek