**REPUBLIC OF NAMIBIA**

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

RULING IN TERMS OF PRACTICE DIRECTION 61

| **Case Title:** | | **Case No:** |
|---|---|---|
| PAMO TRADING ENTERPRISES (PTY) LTD | APPLICANT | HC-MD-CIV-MOT-GEN-2023/00492 |
| and | | **Division of Court:** Main Division |
| THE CENTRAL PROCUREMENT BOARD OF NAMIBIA | 1st RESPONDENT | **Heard on:** 8 December 2023 |
| AMON NGAVETENE | 2nd RESPONDENT | |
| EPAFRAS P SHILONGO | 3rd RESPONDENT | |
| ONNO-ROBBY A NANGOLO | 4th RESPONDENT | |
| MARTINS K KAMBULU | 5th RESPONDENT | |
| HILYA NANDAGO-HERMAN | 6th RESPONDENT | |
| EFAISHE N NGHIIDIPAA | 7th RESPONDENT | |
| JULINDA !GARUS-ÔAS | 8th RESPONDENT | |
| MARY NDESHIHAFELA SHIIMI | 9th RESPONDENT | |
| LUCIA KAZETJIKURIA | 10th RESPONDENT | |
| E SHIPONENI | 11th RESPONDENT | |
| THE MINISTER OF EDUCATION, ARTS AND CULTURE | 12th RESPONDENT | |
| THE MINISTER OF FINANCE | 13th RESPONDENT | |
| REVIEW PANEL | 14th RESPONDENT | |
| SEAL CATERERS (PTY) LTD | 15th RESPONDENT | |
| **Heard before:** Honourable Lady Justice Rakow | | **Delivered on:** 30 April 2024 |
| **Neutral citation**: *Pamo Trading Enterprises (Pty) Ltd v The Central Procurement Board of Namibia* (HC-MD-CIV-MOT-GEN-2023/00492) [2024] NAHCMD 200 (30 April 2024) | | |
| **Order:** | | |

1. The matter is referred for oral evidence and postponed to 7 May 2024 to arrange a date for such.
2. Costs to be costs in the cause.

**Reasons for order:**

RAKOW J:

Introduction

[1] The applicant in these proceedings is Pamo Trading Enterprises (Pty) Ltd, a private company with limited liability duly registered and incorporated in terms of the applicable Namibian company laws, with its registered office situated at 5 Bahnhof Street in Windhoek. The first respondent is the Central Procurement Board of Namibia, a juristic person established by s 8 of the Public Procurement Act 15 of 2015, as amended, with its principal place of business situated at Mandume Park, 1 Teinert Street in Windhoek.

[2] The second respondent is Amon Ngavetene, a male member of the Board of the first respondent and its Chairperson, appointed as such by the Minister of Finance in terms of s 11 of the Public Procurement Act. The third respondent is Epafras P Shilongo, a male member of the board of the first respondent and appointed as such by the Minister of Finance in terms of s 11 of the Public Procurement Act. The fourth respondent is Onno-Robby A Nangolo, a male member of the Board of the first respondent and appointed similarly as the other respondents in terms of s 11 of the Public procurement Act by the Minister of Finance.

[3] The fifth respondent is Martins K Kambulu, a male member of the Board of the first respondent, appointed by the Minister of Finance in terms of s 11 of the Public Procurement Act. The sixth respondent is Hilya Nandago-Herman, a female member of the Board of the first respondent appointed by the Minister of Finance in terms of s 11 of the Public Procurement Act. The seventh respondent is Efaishe N Nghiidipaa, a female member of the Board of the first respondent, appointed as such by the Minister of Finance in terms of s 11 of the Public Procurement Act.

[4] The eighth respondent is Julinda !Garus-Ôas, a female member of the Board of the first defendant and appointed as such by the Minister of Finance in terms of s 11 of the Public Procurement Act. The ninth respondent is Mary Ndeshihafela Shiimi, a female member of the

Board of the first respondent, appointed as such by the Minister of Finance in terms of s 11 of the Public Procurement Act. The tenth respondent is Lucia Kazetjikuria, a female member of the Board of the first respondent and appointed in terms of s 11 of the Public Procurement Act by the Minister of Finance.

[5] The eleventh respondent is E Shiponeni, the Company Secretary of the first respondent and no relief is sought against her. The twelfth respondent is the Minister of Education, Arts and Culture cited in her official capacity, appointed as such by the President of the Republic of Namibia in terms of Article 32(3)(*i*)(*dd*) of the Namibia Constitution. No relief is also sought against her. The thirteenth respondent is the Minister of Finance cited in his official capacity, appointed as such by the President of the Republic of Namibia in terms of Article 32(3)(*i*)(*dd*) of the Constitution of Namibia. The fourteenth respondent is the Review Panel, a statutory body, established in terms of s 58 of the Public Procurement Act and no relief is sought against the Review Panel. The fifteenth respondent is Seal Caterers (Pty) Ltd, a private company with limited liability registered and incorporated in accordance with the applicable company laws of Namibia, also with no relief sought against them.

Background

[6] There was an invitation to tender published by the tender board and many bidders submitted bids. The invitation to tender did not disclose to the bidders that a scoring sheet was intended to be used in the evaluation of phase 3 of the bidding process. The applicant's bid was found substantially responsive to the requirements of phase 3.2 of the bid evaluation process but its bid was disqualified for not scoring 70 per cent when the undisclosed scoring sheet was used. The applicant and some other unsuccessful bidders successfully reviewed its/their disqualification. The Review Panel found that the bids had to be re-evaluated to determine whether they were substantially responsive as required by the Public Procurement Act 15 of 2015, even though the bidders would not qualify on the undisclosed scoring sheet.

[7] Instead of re-evaluating the bids as ordered by the Review Panel, the first respondent gave notice that it will cancel the bidding process. The applicant then applied to this court to review the decision to cancel the bidding process and asked for an order to have the first respondent comply with the order of the Review Panel. The first respondent conceded to an order to comply with the order of the Review Panel which order was granted on 14 March 2023. The matter then returned to be considered and the first respondent again gave notice that it intends to cancel the bidding process. It was this cancellation that triggered the applicant to bring

the current contempt of court application. Part of this review application contains a request to hear oral evidence and this judgment will mainly deal with that request.

The order of the Review Panel and the Court order of 14 March 2023

[8] The Review Panel gave their order on 18 March 2021 with the following terms:

'1. The 1st Respondent's Notice of Selection award in respect of bid number G/ONB/CPBN-1/2020 for Procurement of Supply of Foodstuffs to Government School Hostels, and/or any decision or action incidental hereto in compliance, are set aside in whole.

2. That this matter (bid) is referred to the 1st Respondent for reconsideration with specific instructions in terms of section 60*(c)* of the Public Procurement Act 15 of 2015 (as amended).

The specific instructions are as follows:

2.1. That the 1st Respondent re-evaluate the bids that contained Social Security Commission's Good Standing Certificates issued in respect of this bid.

2.2 That the 1st Respondent re-evaluate the bids on all other aspects highlighted in this Order i.e. Namibianisation, Storage Facility/Warehouse, et al.

2.3 That the re-evaluation of the bids be done strictly in accordance with the criteria and methodology set out in the Instructions to Bidders to the extent that they are consistent with the provisions of the law.

2.4 That the re-evaluation herein is limited to bidders that have agreed in writing to the extension of the bid validity period in accordance with Section 49(2) and/or 43(3) (if applicable).

2.5. That if the re-evaluation herein takes longer than the remaining portion of the extended bid validity period, the 1st Respondent should seek another extension with bidders.'

[9] The court order granted on 14 March 2023 reads as follows:

'1. The 1st respondent's decision purportedly taken on 7 October 2021, set out in the Notice of Bid Cancellation purportedly signed by the 2nd Respondent on 12 October 2021, to cancel the bidding process of Procurement Reference number: G/ONB/CPBN-01/2020 (Procurement of Supply of Foodstuffs to Government School Hostels) is hereby reviewed and set aside.

2. The 1st respondent is ordered to re-evaluate the bids, including the bid of the 57th Respondent, in Procurement Reference No. G/ONB/CPBN-01/2020 (Procurement of Supply of Foodstuffs to Government School Hostels) in full compliance with the order of the 5th Respondent decided on 18

March 2021.'

Relief sought

[10] The applicant asks for the following relief:

'1. The applicant's non-compliance with the forms and service provided for by the rules of court is condoned and the matter is heard as one of urgency.

2. The first to tenth respondents are found guilty of being in contempt of the order of this Court given under case number HC-MD-CIV-MOTREV-2021/00422 and made on 14 March 2023.
3. The first to tenth respondents are granted 7 calendar days from the date of this judgment, to purge the contempt set out in paragraph 2 above.
4. The first to tenth respondents, shall pay the applicant's costs, taxed on the attorney and own client scale, and such costs shall include the costs of one instructing and two instructed counsel.
5. A rule nisi is hereby issued calling upon the first to tenth respondents and any other interested party to show cause (on a date and time determined by the Court) why:

   5.1 The Court should not sentence the first to tenth respondents to a fine or a period of imprisonment or both.

   5.2 The Court should not order the first to tenth respondents to be jointly and severally liable for the costs order in paragraph 4 hereof.

6. Further and / or alternative relief.'

Arguments of the parties

[11] On behalf of the applicant it was argued that there is a legal dispute – whether or not the order has been complied with – which will be resolved by interpreting the order and no further evidence is necessary.

[12] In this regard, the answering affidavit contains three mutually destructive versions, in that:

12.1. First, it is alleged that the court order could not be implemented (i.e. it is a meaningless order) because the order did not itself extend the bid validity periods all of which had expired by the time that the order was made, and the CPBN cannot revive expired bids;

12.2. Second, it is alleged that the bid evaluation has been completed and so the order

has been complied with because, so it is argued, the order does not require the CPBN to act upon the re-evaluation done in terms thereof;

12.3. Third, it is alleged that the application to hold the CPBN and its board members in contempt of the order is premature, because the process of implementation, which includes the final decision to be made on the basis of the outcome of the re-evaluation, has not been completed and, so it is argued, the proper application would have been a mandamus to compel the implementation of the order by a certain (unspecified) future date, all three of which are irreconcilable with one another.

[13] They further argued that there is only one issue that must be referred to cross-examination and that is whether or not the non-compliance with the order was wilful or mala fide. The witnesses which must be cross-examined, are the second to tenth respondents, who are the first respondent's board members and the bid evaluation committee chairperson, namely: Dominic Shikola, and each of whom will not take longer than 30 minutes. The only other witness will be Mr Festus Hamukwaya, the first respondent's internal legal advisor, whose cross-examination will not take longer than one day. It follows that the cross-examination is limited to two days.

[14] On behalf of the respondents, it was submitted that this is not a case where referral to oral evidence is warranted. Needless to articulate that even if that was the case, there is no set out by the Honourable Court in this application to enable the Honourable Court to exercise its discretion and refer to oral evidence.

[15] It was submitted that the applicant's founding papers pay scant regard to information set out in the respondents' affidavits which demonstrate the extent the facts that were already within the applicant's knowledge pertaining to the active steps that the CPBN embarked upon to implement the order of the Honourable Court of March 2023. On behalf of the respondents, it was argued that the applicant's papers are devoid of any real material dispute which could justify the conclusion that there is a material dispute of facts. The latter, at best for the applicant, posed a series of rhetorical questions and perceptive dissatisfaction without point as to what exactly the alleged dispute/s of fact/s are. No definitive answer came from the applicant on the various factual issues advanced by the respondents on the extent that they have gone to implement the Order of the Honourable Court.

<u>Legal arguments</u>

[16] In *Moropa and Others v Chemical Industries National Provident Fund and Others*[1] at paragraph 13 the court stated that: '[13] An application to refer a matter to oral evidence must be timeously brought – an opponent should not be ambushed at the hearing as has occurred here. The application must be clear in its intent and focused on a real dispute of fact. Put differently, a matter should not be referred to oral evidence if no facts are to be elicited. The evidence to be presented must be clearly, concisely and unambiguously identified. To avoid entering the realms of trial, it should not be open-ended or overly wide. A referral to oral evidence is very different from a referral to trial. While the NBC motion asks for the former it is actually seeking more than that, something closer to a referral to trial. This is manifest in the marked difference between what the motion says and what the draft order contains.'

[17] Rule 67(1) provides that:

'Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may (a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness.'

[18] In *Executive Properties CC and Another v Oshakati Tower (Pty) Ltd and Others,*[2] Strydom AJA said the following regarding the test for a matter to be referred for oral evidence to be heard:

'In the *Room Hire*[3] case the Court stated that one of the clearest ways in which a dispute of fact arises is "(a) when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed.'

[19] In instances where application is made to refer evidence on affidavit to evidence *viva voce,* the general rule laid down by the South African Appeal Court in the case of *Hilleke v Levy* 1946 AD 214 is as follows:

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[1] *Moropa and Others v Chemical Industries National Provident Fund and Others* 2021 (1) SA 499 (GJ).
[2] *Executive Properties CC and Another v Oshakati Tower (Pty) Ltd and* Another (SA 35 of 2009) [2012] NASC 14 (13 August 2012).
[3] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd,* 1949 (3)SA 1155 (TPD).

'In *Prinsloo v Shaw* (1938 AD 570) it was said that it is not disputed that the general rule of our practice is that, where the material facts are in dispute, a final interdict will not be granted merely on the affidavits. In *Mahomed v Melk* (1930, T.P.D. 615), which was an application for sequestration, it was held that even where, on the affidavits, there was a balance of probabilities in favour of the creditor's version, the Court must be satisfied that a *viva voce* examination and cross-examination will not disturb this balance of probabilities before making an order for sequestration on affidavits.(p 219.)'

[20] More recently the test was restated in the case of *Kalil v Decotex (Pty) Ltd and Another,* 1988 (1) SA 943 (AD) at 979 H – I as follows:

'Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent.'

[21] In the matter of *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others,* 2008 (2) SA 184 (SCA) at 204, Cloete, JA, also dealt with the principles applicable where an application was launched to refer the matter to evidence *viva voce,* and stated as follows:

'[55] No affidavits were filed by valuers employed by, or officials in the employ of or who had been in the employ of, the respondents who had personal knowledge of what had transpired when the properties were valued and the purchase prices determined. There was no indication that such persons were available to the respondents, or would give evidence in support of the allegations of fraud if subpoenaed.

[56] Where a respondent makes averments which, if proved, would constitute a defence to the applicant's claim, but is unable to produce an affidavit that contains allegations which *prima facie* establish that defence, the respondent should in my view, subject to what follows, be entitled to invoke Land Claims Court Rule 33(8) or Uniform Rule of Court 6(5)*(g).* Such a case differs from the situation discussed in *Peterson v Cuthbert & Co Ltd* and the *Room Hire* case, alluded to in that part of the *Plascon-Evans* decision quoted in para [24] above which refers to those two cases. There, the respondent puts in issue the facts relied upon by the applicant for the relief sought by the latter. In the situation presently being considered the respondent may not dispute the facts alleged by the applicant, but do seek an opportunity to prove allegations which would constitute a defence to the applicant's claim. In the former

case the respondent in effect says: given the opportunity, I propose showing that the applicant will not be able to establish the facts which it must establish in order to obtain the relief it seeks; and in the latter the respondent in effect says: given the opportunity, I propose showing that even if the facts alleged by the applicant are true, I can prove a defence.(It is no answer to say that motion proceedings must be decided on the version of the respondent even when the onus of proving that version rests upon the respondent, because *ex hypothesi* the respondent is unable to produce evidence in affidavit form in support of its version.) It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly, and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent.'

[22] A reference to evidence *viva voce* will generally only be granted where, in the words of Fleming, J, 'it is found 'convenient', where the issues are 'clearly defined', the dispute is 'comparatively simple' and a 'speedy determination' of the dispute is 'desirable'.

[23] In *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd*[4] a very short summary of the applicable trite principles are set out and these are as follows:

'a) First, courts take a "robust common-sense approach" to disputes of fact in motion proceedings.[5] This is because, "otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'[6]

b) Second, there must be a genuine factual dispute that can only be resolved through the hearing of oral evidence.[7]The South African Supreme Court of Appeal has held that "[a] real, genuine and bona fide

[4] *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-REV-2022/00155) [2024] NAHCMD (28 March 2024.
[5] *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H.
[6] Ibid. See too *Witvlei Meat (Pty)Ltd v Agricultural Bank of Namibia* (A224-2015) NAHMCD (delivered on 7 April 2016), Parker AJ rejected contentions made by the respondent that "this court will be unable to determine the matter on affidavits as the material requisites of the relief sought are materially disputed by the respondent" by deploying the test and principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and earlier Namibian authorities.
[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I. See too: *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para 13.

dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."[8].

c) Third, courts will not refer a matter to oral evidence unless it will disturb the balance of probabilities arising from the papers in favour of the applicant.[9] In the seminal *South African case of Kalil v Decotex (Pty) Ltd*[10] , Corbett JA (as he then was) held as follows:

'Naturally, in exercising this discretion the court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour''

[24] In *Gaya v Rittman*[11], Angula AJ (as he then was) held that:

'[38] In certain instances the denial by the respondent of the facts alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of facts. In such instance rule 67(1) may be dispensed with if the court is satisfied that the party who raised the dispute has in his affidavit seriously addressed the fact said to be disputed.

[39] Upon careful evaluation of the allegation in the papers, it is apparent that no genuine dispute of fact is raised in respect of the allegation of forgery or fraud in the redistribution agreement. The remainder of the issues said to be denied, do not raise genuine disputes between the parties. I shall revert to this point later in this judgment; save to hold that there is no genuine dispute of facts that could not be resolved on the papers.'

Discussion

[25] Looking at the statements filed before court, it is clear that there is a struggle to find common ground with the issues at hand. It is clear that the applicant alleges that there is indeed no need to cancel the tender as is possible to evaluate the tender as instructed by the Review Board and the court order of 14 March 2023 whilst the respondents say that it was not possible to evaluate the tenders and that is why they proceeded to cancel the tender. If this is determined then the court will at the same time determine whether the defendants were mala fide in their decision and therefore guilty of contempt, or not.

[8] Ibid at para 13 or 375G.
[9] Erasmus at D1-75.
[10] *Kalil v Decotex (Pty) Ltd* 1998 (1) SA 943 (A) followed in Namibia in Executive Properties CC and another v Oshakati Tower (Pty) Ltd and Others 2013 (1) NR 157 (SC).
[11] *Gaya v Rittmann N.O* (A 78/2015) [2016] NAHCMD 388 (12 December 2016).

[26] On the papers it is clear that there is a dispute of fact as the applicant insists that it is possible to take a decision on the tenders and the defendants maintain that it is not possible and the tender should be cancelled. For the above reasons I have referred this matter for the leading of oral evidence.

[27] In the result, I make the following order:

1. The matter is referred for oral evidence and postponed to 7 May 2024 to arrange a date for such.
2. Costs to be costs in the cause.

| **Judge's signature** | **Note to the parties:** |
|---|---|
| E RAKOW<br>Judge | Not applicable |
| **Counsel:** | |
| **Applicant:** | **Respondents**: |
| J Jacobs (with him J Visser)<br>Instructed by Koep & Partners, Windhoek. | T Phatella (with him E Shifotoka and F Da Silva)<br>Instructed by Office of the Government Attorney, Windhoek. |