

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case number: HC-MD-CIV-MOT-REV-2024/00007

In the matter between:

**ADAPTIVE BUILDING LAND CONSTRUCTION CC JV
CHINA STATE CONSTRUCTION ENGINEERING
CORPORATION (SOUTHERN AFRICA) (PTY) LTD**

APPLICANT

and

CHAIRPERSON OF THE REVIEW PANEL

1ST RESPONDENT

**CHAIRPERSON OF THE CENTRAL PROCUREMENT
BOARD**

2ND RESPONDENT

**IS ZHONG MEI (PTY) LTD JV LUKA ROADS RAILS &
CIVILS CC**

3RD RESPONDENT

4TH RESPONDENT

CSV CONSTRUCTION NAMIBIA (PTY) LTD

5TH RESPONDENT

OTESA CIVIL ENGINEERING (PTY) LTD JV

6TH RESPONDENT

MAKALANI ENGINEERING CC JV JNJ TRADING CC

NEXUS CIVILS JV M.E.S INVESTMENTS

7TH RESPONDENT

SIKU INVESTMENTS JV CHINA JIANGXI

8TH RESPONDENT

INTERNATIONAL

CHINA JIANGSU INTERNATIONAL NAMIBIA JV S.

9TH RESPONDENT

SHIKONGO CONSTRUCTION & RENOVATION CC AN CONSTRUCTION CC JV KL CONSTRUCTION (PTY) LTD	10 TH RESPONDENT
TUBE-O FLEX NAMIBIA (PTY) LTD	11 TH RESPONDENT
SHAFI TRADING ENTERPRISES CC	12 TH RESPONDENT
VALOMEK CIVIL JV CHINA RAILWAY SEVENTH GROUP NAMIBIA (PTY) LTD	13 TH RESPONDENT
C.K HEYDT CC JV UNIK CONSTRUCTION ENGINEERING NAMIBIA (PTY) LTD	14 TH RESPONDENT
KSP CIVILS CC	15 TH RESPONDENT
NDAKALIMWE INVESTMENT CC	16 TH RESPONDENT
SS KUNENE TRADING CC JV AVIC-INTL PROJECT ENGINEERING COMPANY	17 TH RESPONDENT

Neutral citation: *Adaptive Building Land Construction CC JV China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Chairperson of the Review Panel (HC-MD-CIV-MOT-REV-2024/00007) [2024] NAHCMD 57 (14 February 2024)*

Coram: DE JAGER AJ
Heard: 26 January 2024
Delivered: 14 February 2024

Flynote: Practice – Urgent application – Condonation – Non-compliance High Court Rules – Dispense with forms and service – Unspecified – Condonation sought in a blanket manner and from the bar is incompetent and procedurally irregular.

Practice – Urgent application – Rule 73(3) sets demand – Nature and extent of urgent procedural relief sought, and urgent disposal of case, must, as far as practicable, be in terms of rules – Rationale – Give effect to objective of procedural fairness – Nature and extent of urgent procedural relief sought must be commensurate with the need of the case and supported by the facts, failing

which court may refuse to dispense with forms and service – Urgent application procedure does not entitle disregard of all forms and service – Rule 73(4) – requirements to engage urgent application procedure restated.

Practice – Parties – Necessary party omitted from notice of motion – Necessary party not party to proceedings – Citation of party in founding affidavit cannot remedy omission from notice of motion – Rule 65(1) – Application initiating new proceedings commences with the issue of a notice of motion, not with the deposition of a founding affidavit – Rule 65(2) – Notice of motion must be addressed to a party where it is necessary to give such party notice of the application.

Statute – Interpretation – Urgent application – Rule 73(3) – Court's power to dispense with service – Not power to dispense with service altogether unless urgent ex parte application supported with facts – Cannot condone non-service – Nullity.

Practice – Urgent application – Service – Purpose of service – Includes benefit of explanation of meaning and nature of process – Service effected by legal practitioner by email – Condonation from bar – Cannot condone possible non-service – Facts must support form of service sought – Rule 9(1)(c) – Proof of service by affidavit – Application initiated new proceedings – Service required by deputy sheriff in the prescribed manner unless facts support condonation for non-compliance – No explanation why physical service not effected – Flagrant non-compliance with rules – Service must be effective – No proof notice of application received – If received, no benefit of explanation of meaning and nature of process – fourth to seventeenth respondents and necessary party not served – Alternatively not served adequately – No case made for court to dispense with the prescribed service – Court exercises discretion against applicant – Refuses condonation – Refuses notice of motion prayer one.

Summary: The applicant and the fourth to seventeenth respondents were unsuccessful bidders in a tender, and JDN Civil Engineering CC JV New Era Investment (Pty) Ltd, who will be referred to as JDN, was the successful bidder. The second respondent, the Chairperson of the Central Procurement Board,

declared the applicant's bid non-responsive and disqualified the applicant. The applicant exhausted its internal remedies. The applicant approached the court to review the first respondent's (the Chairperson of the Review Panel) decision to dismiss the applicant's review application. The applicant also approached the court for urgent interim relief. The applicant seeks an order condoning its non-compliance with the rules and hearing the application on an urgent basis. The applicant seeks further orders, operative with immediate effect, interdicting the second respondent from awarding the project to JDN and, pending the outcome of the review application, that they be interdicted from implementing or executing any procurement contract awarded by the second respondent for the project. The first and second respondents oppose the application.

Held that High Court r 73(3) sets a demand on the court, the parties, and the practitioners that, if a matter is disposed of on an urgent basis, it must, as far as practicable, be in terms of the rules. Rule 73(4) prescribes what a party must do to engage the court's urgent application procedure.

Held that the nature and extent of the urgent procedural relief sought must be commensurate with the need of the case, and the facts in the founding affidavit must support it.

Held that launching urgent application procedures does not entitle a party to disregard all forms and service, and if a party wishes to be excused from the forms and service of the High Court Rules, such party must make a case to be excused from it, failing which the court may refuse to dispense with it. A party in urgent application proceedings must nevertheless give effect to the objective of procedural fairness. The procedural relief sought must, as far as practicable, be in terms of the rules.

Held that condonation sought for non-compliance with the High Court Rules in a blanket manner without specifying that condonation is sought for non-compliance with the forms and service of the High Court Rules, together with the condonation relief sought from the bar, is incompetent and procedurally irregular.

Held that motion proceedings are initiated with the issue of a notice of motion (r 65(1)) and not with the deposition of a founding affidavit. JDN, a necessary party to the proceedings, was omitted from the notice of motion, and the notice of motion had to be addressed to it (r 65(2)). JDN is not a party to the proceedings. JDN's citation in the founding affidavit cannot remedy the omission from the notice of motion.

Held that unless the court deals with an urgent ex parte application supported by facts, the power of the court in r 73(3) to dispense with service must not be interpreted to mean that the court may dispense with service altogether and thereby condone non-service that would otherwise amount to the proceedings being nullified.

Held that the application initiated new proceedings, and unless a case is made for the prescribed service to be dispensed with, service had to be effected by the deputy sheriff under the High Court Rules.

Held that adverse inferences are drawn from the following. On the applicant's papers, the applicant knows the physical addresses of the fourth to seventeenth respondents and JDN. Yet, the applicant's deponent stated under oath that their further particulars are unknown. It was further stated that a 'physical copy' would be delivered to the respondents' places of business whose physical addresses are known and where such physical service is possible. Yet none of those respondents nor JDN was served at their physical addresses, and there is no explanation that physical service on any of them was impossible. No facts are provided as to why time required service by email.

Held that the fundamental purpose of service is that a party receives notice of the proceedings. It includes the benefit of an explanation of the process's meaning and nature. While the substance of service should trump its form, each case must be decided on its facts. While there is a possibility to condone irregular service, non-service cannot be condoned.

Held that on the facts, the explanation that because of time and that it was urgent, physical service was not effected on the fourth to seventeenth

respondents and JDN is no explanation. The applicant, for no reason, flagrantly disregarded the rules of service. There is no proof that the fourth to seventeenth respondents and JDN received notice of the application. The applicant failed to make a case for the court to dispense with the prescribed service. The court exercises its discretion against the applicant, refuses condonation and refuses prayer one of the notice of motion.

ORDER

1. Part A of the application dated 16 January 2024 is struck from the roll.
 2. There is no order as to costs.
 3. Part A of the application dated 16 January 2024 is regarded as finalised and removed from the roll.
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RULING

DE JAGER AJ:

Introduction

[1] The applicant and the fourth to seventeenth respondents were unsuccessful bidders in a project to construct the Naute-Keetmanshoop water pipeline. JDN Civil Engineering CC JV New Era Investment (Pty) Ltd, who will be referred to as JDN, was the successful bidder.

[2] The applicant received the notice of award and executive summary contemplated in s 55(4) of the Public Procurement Act 15 of 2015 (the Act) on 23 October 2023. The applicant was disqualified, and the second respondent, the Chairperson of the Central Procurement Board, declared the applicant's bid

non-responsive. On even date, the applicant filed a reconsideration application with the second respondent in terms of s 55(4A) of the Act. The second respondent dismissed the reconsideration application on 21 November 2023.

[3] The applicant proceeded to file a review application with the first respondent, the Chairperson of the Review Panel, as contemplated in s 59(1) of the Act. In its order of 19 December 2023, the first respondent dismissed the review application and confirmed the second respondent's decision. The applicant exhausted its internal remedies and now wishes to review the first respondent's decision to dismiss its review application.

[4] The applicant's application to the court dated 16 January 2024 consists of two parts. Part A is for urgent interim relief, and part B is a review application. This ruling and order are in respect of part A of the application.

[5] In part A of the application, the applicant seeks an order:

'Condoning the Applicants non-compliance with the rules of this Honourable Court and hearing this application on an urgent basis as envisaged by rule 73 (3) of the High Court Rules.'

and it further seeks orders, operative with immediate effect, interdicting the second respondent from awarding the Naute-Keetmanshoop water pipeline project to JDN and, pending the outcome of the review application, that they be interdicted from implementing or executing any procurement contract awarded by the second respondent for the project.

[6] The first and second respondents opposed the application, but only the second respondent delivered an answering affidavit to which the applicant replied. Whereas the second respondent's deponent failed to allege that he has the authority to oppose the application, the applicant moved for an order that the answering affidavit be struck out.

The condonation and urgent procedural relief

[7] Apart from its prayer that the matter be heard on an urgent basis, the applicant seeks condonation for its non-compliance with the High Court Rules, but it does not specify the non-compliance it wants to be excused from. In applications of this nature, a party usually prays that the forms and service provided in the rules be dispensed with. The applicant does not ask for that in its notice of motion.

[8] For the reasons set out below, the applicant failed to adhere to the demand set by High Court r 73(3), which states that:

‘(3) In an urgent application the court may dispense with the forms and service provided in these rules and may dispose of the application at such time and place and in such manner and in accordance with such procedure which must as far as practicable be in terms of the rules or as the court considers fair and appropriate.’

[9] Rule 73(4) prescribes what a party must do to engage the court’s urgent application procedure. Rule 73(4) reads as follows:

‘(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.’

[10] The facts in an affidavit supporting an urgent application must speak to the nature and extent of the urgent procedural relief sought. If a party wants the court to dispense with the forms provided in the rules, the nature and extent to which such party prays that the forms be dispensed with must be commensurate with the need of the case, and the facts of the case must support it. One case may require hearing the matter without any papers being filed. Such need must be supported by way of oral evidence. One case may require that a party be given five or ten days to deliver affidavits, while another case may require that a party be given only two days to deliver affidavits. The facts must support the need. The same applies to service. If a party wants the

court to dispense with the prescribed service, the nature and extent to which such party prays for the prescribed service to be dispensed with must be commensurate with the need of the case, and the facts of the case must support it. One case may require service by telephone. Another case may require a legal practitioner or a party to effect service or the papers to be emailed. Again, the need must be supported by the facts.

[11] The High Court Rules make provision for various forms and service, and if a party wishes to be excused from it in an urgent application, such party must make a case to be excused from it, failing which the court may refuse to dispense with it. Launching an urgent application does not entitle a party to do as it pleases and disregard all forms and services to suit such party's preference. What a party prays for in an urgent application must 'as far as practicable be in terms of' the rules. The rationale of that requirement is to give effect to the objective of procedural fairness when determining the procedure to be followed in an urgent application. In *Bergmann v Commercial Bank of Namibia Ltd and Another*¹, the court described that requirement as a continuous demand on the court, the parties, and the practitioners to give effect to the objective of procedural fairness. The court agrees with that.

[12] It is procedurally irregular to engage the court and other parties on an urgent basis like the applicant did while seeking condonation for all and sundry under a blanket condonation prayer and to pray for all sorts of condonation where the shoe pinches on the day of the hearing. It has been said before by this court's labour division in *Primedia Outdoor Namibia (Pty) Ltd v Kauluma*², and albeit said in a condonation application context, it is repeated in an urgent application context:

[47] I have the impression that frequently applicants ask for a kind of blanket condonation in case they should have done anything wrong or out of time and then leave it for the court or their opponents to figure out the details, while hoping that all the instances of non-compliance will not be detected. This cannot be countenanced, especially where an indulgence is sought. The applicant must be frank and specific to

¹ *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC) at 50.

² *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* 2015 (1) NR 283 (LC) para 47.

the point of substance. It should also be remembered that the applicant bears the onus of satisfying the court that the indulgence should be granted.'

[13] The court finds that the relief sought in prayer one of the notice of motion, taken together with the condonation relief sought from the bar, is incompetent and procedurally irregular.

[14] Looking at the facts supporting the application, two issues require attention before the issue of urgency arises. They are the parties to the application, in particular, JDN and service of the application.

The parties to the application

[15] The court finds that JDN, the successful bidder, is a necessary party to the proceedings, but JDN is not a party. JDN's name was omitted from the notice of motion, and the notice of motion was not addressed to it.

[16] The applicant's counsel explained that on the issued notice of motion, a space was left between the second and fourth respondent's names where the third respondent's name should have appeared and pointed out that in paragraph seven of the founding affidavit, JDN was cited as the third respondent. The applicant's counsel moved for an amendment from the bar to remedy the space left by 'the registrar's computers', so he said.

[17] The issue is, however, more complex, and for the reasons that follow, the amendment sought is not granted.

[18] Paragraph seven of the founding affidavit shows that the intention may have been to cite JDN as the third respondent, but JDN was not cited as a party to the proceedings. JDN's name does not appear on the notice of motion or the e-justice system as a party to the proceedings, and the notice of motion was not addressed to it.

[19] Rule 65(1) provides that every application must be brought on notice of motion, and every application initiating new proceedings commences with the issue of the notice of motion. Motion proceedings are commenced with the

issue of a notice of motion. Motion proceedings are not commenced with the deposition of a founding affidavit. Even though r 65(4) provides for a notice of motion and all annexures to it to be served before the registrar issues an application, the registrar must still issue the notice of motion, and thereby, the motion proceedings are commenced. Rule 65(2) provides that where it is necessary to give a person notice of an application, like JDN, the notice of motion must be addressed to both the registrar and that person.

[20] The explanation provided by the applicant's counsel for the omission of JDN's name from the notice of motion does not assist the applicant's case. It is ultimately the applicant's responsibility to ensure that its papers are in order, which they are not.

[21] The court finds that the citation of JDN in the founding affidavit cannot remedy the omission of JDN's name from the notice of motion.

[22] The court now turns to consider the issue of service of the application.

Service of the application

[23] Prescribed service is one of the requirements set by the rules which the court may dispense with in terms of r 73(3) when dealing with an urgent application. Unless the court is dealing with an urgent ex parte application supported by facts, that power of the court must not be interpreted to mean that the court may dispense with service altogether and thereby condone non-service that would otherwise amount to the proceedings being nullified.

[24] Rule 8(1) provides that the sheriff must effect service of any document initiating application proceedings in one or other of the ways set out in that rule. Rule 8(7) provides for service only between certain hours of the day, and save for a warrant of arrest, it provides that a civil summons, order or notice, and proceedings or act required in a civil action may not be validly effected on a Sunday unless the court or a judge directs otherwise. Rule 9 deals with proof of service, and r 9(3) provides that within five days from receipt of the document which serves as proof of service and the process served, the person on whose request service was effected must file with the registrar each such document.

Those are some of the requirements of the rules for service which a party in an urgent application may be excused from provided the circumstances of the case require it and a case is made for it.

[25] When the matter was heard on 26 January 2024, only one return of service was filed for service on the first respondent. Even though no return of service was filed for the second respondent, a notice of intention to oppose and an answering affidavit was delivered on his behalf. In respect of the other respondents, and JDN, no returns of service were filed.

[26] When asked about service on the fourth to seventeenth respondents and JDN, the applicant's counsel said that his office effected service through email, but he could not say when it was done. He undertook to deliver a service affidavit and prayed for condonation from the bar. The applicant's counsel submitted that only interim relief is sought and that those respondents are only interested parties, and if JDN was not served, the court could condone the non-service.

[27] As stated before, in its notice of motion, the applicant failed to pray for condonation for non-compliance with the prescribed service and for the court to dispense with it. In its notice of motion, the applicant prays for condonation in a blanket manner without specifying what non-compliance it seeks to be condoned. On the day of the hearing, condonation was sought from the bar for various non-compliances. Looking at the founding affidavit, the facts do not assist the applicant.

[28] The founding affidavit stated the fourth to seventeenth respondents' email addresses, but JDN's email address was only reflected as 'C'. The applicant's deponent further said that the fourth to seventeenth respondents' and JDN's further particulars are unknown to the applicant, and to effect 'service on time', the application will be sent via email to all the respondents. Still, the applicant's deponent also stated that a physical copy will be delivered to the respondents' places of business whose physical addresses are known and where such physical service is possible. Physical service was not effected on any of those respondents or JDN.

[29] No facts were provided as to why service by email was required. The application was issued on 16 January 2024 and set down to be heard only on 26 January 2024. There was no explanation for why physical service could not be effected during that period. No facts were provided that physical service was impossible for any respondent or JDN. In respect of the fourth to seventeenth respondents and JDN it is stated that their further particulars are unknown to the applicant. However, in 'ACS1' attached to the founding affidavit, being the notice for selection of procurement award dated 23 October 2023 addressed to JDN, JDN's physical address appears on the first page of that document, and on the second page thereof, the physical addresses of the fourth to seventeenth respondents are set out. The order in which the names of those respondents appear on that second page is the same order in which those respondents were cited as respondents in the notice of motion. Save for two physical addresses, all the physical addresses set out on those two pages are stated to be in Windhoek. In particular, JDN's physical address is said to be situated in Windhoek.

[30] The applicant's counsel's attention was drawn to the physical addresses set out in 'ASC1' and the allegation in the founding affidavit that the further particulars of the fourth to seventeenth respondents and JDN are unknown to the applicant, and he was asked why service was not effected on their physical addresses. His answer was 'because of time, and it was urgent'. Such a case is not made in the founding affidavit.

[31] Adverse inferences are drawn from the following. On the applicant's papers, the applicant knew the physical addresses of the fourth to seventeenth respondents and JDN. That information was at the applicant's fingertips, yet the applicant's deponent stated under oath that their further particulars are unknown to the applicant. It was further stated that a 'physical copy' would be delivered to the respondents' places of business whose physical addresses are known and where such physical service is possible. Yet, neither the fourth to seventeenth respondents nor JDN was served at their physical addresses, and there was no explanation that physical service on any of them was impossible. Adverse

inferences are also drawn from the absent facts referenced in paragraph [29] above.

[32] The service affidavit deposed by a 'legal intern' at the applicant's legal practitioners' office was subsequently filed. She states that on 18 January 2024 at 09:02, she 'duly served' on the fourth to seventeenth respondents and JDN via email, which is attached. She further states what JDN's email address is 'as indicated in their papers filed with' the first and second respondents. Those 'papers' referred to by the legal intern were not identified.

[33] The Application initiated new proceedings, and unless a case is made for the prescribed service to be dispensed with, it had to be served by the deputy sheriff in one of the prescribed manners provided in r 8(1), none of which is by email. The service affidavit and r 9(1)(c) providing proof of service by an affidavit where the deputy sheriff did not effect service do not assist the applicant's case.

[34] The founding affidavit stated that the respondents who oppose the application will be afforded reasonable time to file their papers. According to the service affidavit, the papers were only emailed to the fourth to seventeenth respondents and JDN on 18 January 2024, while the application was already issued on 16 January 2024. No explanation was provided as to why the papers were only emailed on 18 January 2024. The fact that the papers were only emailed on 18 January 2024 goes against the applicant's argument that physical service was not effected because of time and that it was urgent.

[35] Based on the facts, the explanation that physical service was not effected because of time and that it was urgent is not an explanation. The applicant, for no reason, flagrantly disregarded the rules of court in respect of service.

[36] The fundamental purpose of service is that a party receives notice of the proceedings. As stated in *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Other*³ the purpose of service includes the benefit of an explanation as to the meaning and nature of the process.

³ *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Other* 2013 (1) NR 245 (HC) para 17.

[37] In *Elgin Brown & Hamer Namibia (Pty) Ltd v Hydrodive Offshore International Ltd*⁴ this court referred to *Arendsnes Sweefspoor CC v Botha*⁵ as persuasive authority for the proposition that 'effectiveness of the service of a court process or substantial compliance should trump form' and that litigation should be completed inexpensively and expeditiously. It, however, went on to state that each case must be decided on its facts, a rubber stamp approach should be avoided, and in certain circumstances, form cannot bow down to substance. As in *Standard Bank Namibia Ltd and Others v Maletzky and Others*⁶, the court acknowledges the possibility that irregular service may be condoned where there has not been 'a complete failure of service', which would amount to a nullity incapable of being condoned.

[38] Even if a blind eye would be turned to the applicant's remiss to the rules of court, which the court does not do, service must have been effective. There is no proof that the fourth to seventeenth respondents and JDN received notice of the application. There is no email transmission report before the court, and they certainly did not have the benefit of an explanation as to the meaning and nature of the process. The email whereby the papers were sent to them reads:

'Kindly find the attached URGENT APPLICATION file with the High Court of Namibia and set to be heard on the 26th of January 2024.'

[39] The court finds that the fourth to seventeenth respondents and JDN, a necessary party to the proceedings, were not served. Alternatively, they were not adequately served under the rules of court.

Conclusion

[40] In conclusion, the court finds that the applicant failed to make a case for the court to dispense with the prescribed service. The court exercises its discretion against the applicant, refuses condonation for non-compliance with the prescribed service, and refuses to grant prayer one of the notice of motion.

⁴ *Elgin Brown & Hamer Namibia (Pty) Ltd v Hydrodive Offshore International Ltd* 2017 (3) NR 752 (HC) paras 21 and 22.

⁵ *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) para 14.

⁶ *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) para 23.

[41] In the circumstances, it is unnecessary for the court to make a finding on the applicant's prayer to have the answering affidavit struck out.

[42] It is ordered that:

1. Part A of the application dated 16 January 2024 is struck from the roll.
2. There is no order as to costs.
3. Part A of the application dated 16 January 2024 is regarded as finalised and removed from the roll.

B de Jager
Acting Judge

APPEARANCES

APPLICANT:

K Amoomo
Of Kadhila Amoomo Legal Practitioners,
Windhoek

SECOND RESPONDENT:

C Endjambi (with her W Chinsemu)
Of Office of the Government Attorney,
Windhoek