

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO: HC-MD-CIV-MOT-REV-2020/00031

In the matter between:

BALTIC CONSTRUCTION CC

APPLICANT

and

CHAIRPERSON OF THE REVIEW PANEL

FIRST RESPONDENT

**COUNCIL FOR THE MUNICIPALITY OF
WINDHOEK**

SECOND RESPONDENT

**ACCOUNTING OFFICER OF THE COUNCIL
FOR THE MUNICIPALITY OF WINDHOEK**

THIRD RESPONDENT

FACILITY INVESTMENTS CC

FOURTH RESPONDENT

**MINISTER OF FINANCE OF THE REPUBLIC
OF NAMIBIA**

FIFTH RESPONDENT

Neutral Citation: *Baltic CC v Chairperson of the Review Panel* (HC-MD-CIV-MOT-REV-2020/00031 [2020] NAHCMD 69 (07 February 2020)).

CORAM: MASUKU J

Heard: 19 February 2020

Delivered: 07 February 2020

Flynote: Civil Practice – urgent applications – Rule 73 – requirements to be met by applicant in an urgent application – interim relief sought – whether

same is inherently urgent and exempts applicant from complying with Rule 73 requirements – Certificates of urgency – their necessity and value discussed.

Summary: The applicant approached the court on the basis of urgency, essentially seeking an interim interdict, pending the review and setting aside of a decision of the Review Panel, which ordered the Council for the Municipality of Windhoek to set aside and issue a fresh tender for concrete and bitumen works for eastern Windhoek, which the applicant had been awarded. The respondents, including the 4th respondent, which the Review Panel found had been wrongly disqualified from the tender, opposed the application and argued, among other things, that the applicant had failed to comply with the mandatory requirements of Rule 73 in bringing the application. They accordingly urged the court to strike the matter from the roll for want of urgency.

Held: that in applications alleged to be urgent, the applicant must comply with the mandatory requirements of rule 73, and in particular state explicitly in the founding affidavit the circumstances which render the matter urgent and why the applicant claims it cannot be granted substantial redress at a hearing in due course.

Held that – the mere fact that an application requires the granting of interim relief does not *per se* exempt the applicant therefor from complying with the mandatory requirements of Rule 73.

Held further that – the compliance with rule 73 is the key that opens the door to a litigant eventually obtaining redress, interim relief included.

Held: that legal practitioners should ensure that when they sign certificates of urgency, they have satisfied themselves, as officers of the court as to the urgency of the matter alleged. Such certificates should not be signed as a matter of routine, as courts lay a premium on them, as they are signed by officers of the court.

The court concluded that the applicant had failed to comply with the requirements of rule 73 and that the application should, for that reason, be struck from the roll with costs, for want of urgency.

ORDER

1. The application is struck from the roll for want of compliance with the requirements of Rule 73(4)(a) and (b).
 2. The Applicant is ordered to pay the costs of the application, where applicable, consequent upon the employment of one instructing and one instructed Counsel.
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RULING

MASUKU J:

Introduction

[1] Applications touted or purported to be urgent, broadly fall within three categories in this jurisdiction. First, are those that are, indeed urgent. The second category, is that of applications where the urgency alleged, is created or contrived by the applicant. The last, predictably, is the applications, which are adjudged not to be urgent.

[2] In this application, which was served and touted by the applicant to be urgent, the respondents, in unison, cry out to the court to strike the matter from the roll, for, so they claim, that the matter is not urgent within the meaning ascribed to the provisions of rule 73 of this court, regulating the requirements for a matter to be declared and dealt with by the court as urgent.

The parties

[3] The applicant, Baltic Construction CC, is a close corporation, registered in terms of the Close Corporations Act, 1988.¹ The applicant's place of business, is situate at Beethoven and 9 Strauss Street, Windhoek West. The applicant's affidavit, is deposed to by its member, Mr. Peter Hauwanga.

[4] The 1st respondent, is the Chairperson of the Review Panel, a body created in terms of the provisions of s 58 of the Public Procurement Act, No. 15 of 2015, ('the Act'). Its offices are situate at Molkte Street, Windhoek. The 2nd respondent is the Council for the Municipality of the City of Windhoek, whose offices are situate at 80 Independence Avenue, Windhoek. The 3rd respondent, is the Accounting Officer of the 2nd respondent, sharing the same address as the 2nd respondent.

[5] The 4th respondent is Facility Investments CC, a close corporation duly registered in terms of the provisions of the Close Corporations Act of 1988. Its place of business is situate at Dante Street, Windhoek. The 5th respondent is the Minister of Finance, whose offices are situate at Molkte Street Windhoek. He is cited for any interest he may have in the proceedings.

Relief sought

[6] The applicant approached this court, seeking in essence, what may be referred to as a double-barrelled order, namely relief in two separate parts, being Parts A and B. In Part A, he seeks an order enrolling this matter as one of urgency; ordering that the decision taken by the 1st respondent on an unspecified date, be not implemented, pending the finalisation of review proceedings in terms of Part B and an order that the non-implementation of the decision referred to serves as an interim interdict with immediate effect, pending the finalisation of Part B of the application.

¹ Act No. 26 of 1988.

[7] In Part B of the application, the applicant seeks an order (a) reviewing, correcting and setting aside the decision of the 1st respondent taken on 17 December 2019 and communicated to the applicant on 27 January 2020; (b) an order declaring that the 1st respondent's Review Panel was not appointed in accordance with section 58(3) of the Act, as invalid and of no force in law and setting aside all processes and steps taken in accordance with such decision; (c) declaring all decisions taken and processes undertaken by the 1st respondent's Review Panel as null and void; (d) declaring that the 2nd respondent honours the Procurement Contract between it and the applicant. The applicant further seeks an order for costs against any party that opposes the relief sought.

[8] It is important, in this regard, to point out that the Minister, who is cited in the proceedings, did not oppose the application but was content to abide by the decision of the court. To this end, his legal representatives were on a watching brief and did not participate in the exchange of hostilities during proceedings.

Background

[9] The factual matrix, giving rise to the present application does not raise much controversy. It is by and large common cause and it acuminates to this: the applicant and the 4th respondent were bidders who responded to an advertisement of a tender issued by the 2nd respondent. The tender was in respect of concrete and bitumen works for the eastern suburbs of Windhoek. The bids were due on 26 June 2019 at 11 o'clock.

[10] In the course of the evaluation of the bids by the 2nd respondent, the 4th respondent's bid was disqualified on the basis that its submission was alleged to have not been filed and stamped in terms of the evaluation criteria. The tender was eventually awarded to the applicant. There is a dispute regarding whether the contract was signed or not for the applicant to start the work in earnest and I do not need to address that issue at this juncture.

[11] Dissatisfied with its disqualification, the 4th respondent took issue and approached the 2nd respondent for answers. The matter was escalated to eventually serve before the Review Panel, which in its decision, found that the 4th respondent's bid had been wrongly disqualified, an issue that the 2nd respondent itself appears to have confirmed.

[12] The Review Panel accordingly issued a decision dated 17 December 2019, in terms of which it found that the 2nd respondent acted or proceeded in a manner not in compliance with the Act. It accordingly ordered the procurement proceedings to be terminated and started afresh. This is the decision that the applicant attacks and seeks to have set aside.

[13] It is important, before dealing with Part A of the decision and deciding whether it is competent to grant, to first consider whether this is a proper matter to enrol as one of urgency. This is so because all the respondents hotly contest the propriety of the application being enrolled as one of urgency. It is accordingly proper that this question be determined first as it may have an immediately dispositive effect, at least, *pro ha vice*, on the matter.

Urgency

[14] The respondents argued quite strenuously that the application is not urgent and that the bringing of the application is an abuse of the urgency provisions by the applicant. In this regard, it was argued that the mandatory requirements of the rules regarding the threshold any applicant for urgency should meet, have not been met by the applicant. The application by the respondents in that regard, was for the court to strike the matter from the roll for want of any urgency.

[15] The requirements of rule 73 regarding urgent applications, have been the subject of determination in many cases without number. In this regard, it may be stated that rule 73(4) has two mandatory requirements to be met by an applicant, namely, stating explicitly the reasons why the matter is rendered urgent and secondly, stating in explicit terms why the applicant claims he or

she cannot be afforded substantial redress at a hearing in due course. These requirements, the applicant, is accused of having failed to meet.

[16] What allegations has the applicant made on oath, to meet the urgency alleged? The applicant attempted to deal with these requirements from para 26 of its founding affidavit. The sub-title under which the issues are addressed, is telling. It is headed 'Interim relief and Urgency'.

[17] The applicant alleges as follows in para 26, 'I have been advised by the Applicant's legal practitioner that interim relief proceedings are naturally urgent and the Applicant simply needs to prove four requisites, namely:

26.1 *prima facie* right;

26.2 irreparable harm to be suffered if the interim relief is not granted;

26.3 lack of alternative satisfactory remedy; and

23.4 the balance of convenience favours granting the orders sought.'

[18] With the foregoing apparently deemed insufficient on this issue, the applicant proceeds to state again on oath in para 27 as follows:

'It is not necessary to address separate requisites requirements (*sic*) in respect of urgency, as interim on its own is an urgent remedy. The decision made by the First Respondent to the effect that the procurement process – which had in any event been completed – should be terminated and start afresh is undeniably invalid on the basis of the grounds raised in below.'

[19] It is thus abundantly obvious that the applicant starts this case on a very erroneous premise, predicated, so he says, on legal advice, namely that where a party applies for interim relief, that party is exempted from addressing the requirements for urgency. This, so the allegation goes, is because the seeking of an interim order, is itself urgent. The advice goes further, namely, that because an order seeking interim relief is naturally urgent, all that the applicant needs to allege and prove, are the requirements for the granting of an interim interdict.

[20] The advice offered to the applicant, unfortunately finds no support in our rules of court. The rules do not create an exception for an applicant who requires interim relief, from dealing with and meeting the mandatory requirements of rule 73. In point of fact, there is no circumstance when an applicant would be exempted from complying with the said rule, if the allegation is that the matter is urgent.

[21] I know of cases where because of the urgency attendant or apparent in the matter, the court allowed an oral application to be made on oath, without an affidavit. Even then, the applicant for the order, would have to make the mandatory allegations required peremptorily by rule 73(4)(a) and (b), in particular, on oath in the application for enrolment of the matter as one of urgency. There is no situation envisaged, where a party is at large, because of the relief he or she seeks, to be exempted from complying with the mandatory urgency requirements.

[22] The position of the law in this regard, is that meeting the requirements relating to urgency is the key that opens the doors of the court to a litigant. Only once the said portals have been opened, using the instrumentality of the key of urgency, can the applicant then seek an order, whether interim relief or other redress. This is so because the applicant would have at that point, lawfully entered the court's doors and ready to be served, so to speak, with the relief required, if properly motivated.

[23] For this reason, if an applicant does not deal with the said requirements, he or she is not entitled to any redress he or she seeks because any access thereto, should follow after the applicant has first fully met the requirements of rule 73. Any other position would amount to an applicant obtaining an order, having come, as scripture records, through the roof. This is not allowed in the courts of Namibia. The roof and windows serve other purposes than being points of ingress.

[24] It is accordingly clear that the applicant in this matter, on advice, wrongly conflated the requirements of urgency with those of an interim

interdict. These are separate requirements, the one being procedural and the other, a requirement of substantive law. It may be true that one of the requirements in both, tends to coalesce, but that is all it is. The one requirement that appears to coincide in both matters, does not result in the applicant having to content him or herself with complying with the one or the other, when both types of relief are sought. Each has to be properly and fully canvassed and motivated in the founding affidavit.

[25] On this ground alone, this court is eminently empowered, in the circumstances, to refuse to enrol this matter as one of urgency. There are, however, other reasons on which the applicant lands badly and is thus bruised. In rule 73(4)(b), an applicant for urgency, must allege that he or she has no sufficient redress at a hearing in due course. This, as mentioned, has not been addressed.

[26] What is more, is that the respondents have argued, and quite forcefully too, that the applicant has other remedies open to him in due course, namely, suing the 2nd respondent either for specific performance or damages. This argument commends itself to the court as being in the rails of stainless jurisprudence. It may also well be that this argument has a possibly deleterious effect on the propriety of granting an interim interdict, as one of the requirements in that regard is that the applicant should show that he or she has no other alternative remedy, as the respondents argued. I reserve my views on this aspect.

[27] One issue I need to turn to for procedural guidance, was raised by Mr. Muhongo in argument. It relates to the issue of the certificate of urgency, which in this case, was signed by Mr. Namandje himself. In it, he 'certifies that I have perused the papers in this matter and that I am of the opinion that this is a matter of urgency as provided in Rule 73 of this Honourable Court and that this application can be heard on an urgent basis.'

[28] As foreshadowed above, there is no compliance by the applicant in his founding affidavit with the requirements of rule 73, as Mr. Namandje alleges.

In this regard, it is incorrect for counsel to certify as he did, particularly in the light of the non-compliance. It is a matter of duty that I point out that the court places heavy reliance and premium on certificates filed by its officers, the one under scrutiny, expressly included. Such certificates should not be signed as a matter course or of routine.

[29] It would have been a very easy and less onerous of the rule-maker, to have called on the litigant him or herself to certify the matter as urgent. Because the litigant has something to gain and his or her impartiality may be clouded by the relief sought or its impact, he or she may not be properly placed to make a certification that is unbiased and impartial and thus fit to be acted upon by the court at face value. That the applicant's legal practitioner is to make the certification is to acknowledge his or her duty as an officer of the court. In this regard, whilst pursuing a client's cause, he or she must ensure that his duty to the court, as an officer, takes precedence and does not play second fiddle to the interests of the client.

[30] So serious is this certification that in other jurisdictions, as I pointed out in court during the hearing, the certificate is signed by counsel, who is expected to bring to bear, independent judgment on the alleged urgency. In yet other jurisdictions, the certificate by the applicant's legal practitioner should specify the exact paragraphs in the founding affidavit on which the legal practitioner relies for his opinion that the matter is urgent as he or she certifies. The latter, would, as a matter of practice, not be out of place in this jurisdiction in my considered view.

[31] It is quite comely and propitious that a word of caution should be sent out to our legal practitioners in this regard. I can, in this regard, do no better, than to quote with approval, the wise injunctions issued by Nganunu J, (later Chief Justice of Botswana, as he then was) in *Big Game Development (Pty) Ltd v De Kock*,² where the learned Judge stated as follows:

² 1997 (BLR) 301(HC) at 305.

'Urgency is relative. It is important that practitioners must not abuse this exceptional practice for the simple reason that it deprives the opposite party of their usual rights and upsets the orderly dispatch of court business. Constant and persistent disturbance of court and judges' schedules results in chaos. Practice has shown that the rule is quite clearly abused and practitioners have resorted to signing certificates of urgency not because of any urgency but to gain an advantage of one type or the other to which their clients are not entitled. The advantage that practitioners most often aim at is to have their cases heard before they could otherwise have been heard if they follow the ordinary rules. This may be because the courts are congested, but jumping the queue, as it were, is not conducive to proper disposal of other cases not fair to opponents'

[32] It is accordingly poignant to remind legal practitioners that in signing certificates of urgency, they are not merely fulfilling a procedural requirement demanded by the rules. They are, at the same time, performing a primary duty they owe to the court as its officers. It is thus necessary that legal practitioners should, before appending their signatures on the certificates, pause and anxiously reflect and satisfy themselves that their signature bear their honest legal view regarding the urgency alleged.

Conclusion

[33] In view of what appear to be insuperable difficulties facing the applicant in the instant matter, it is plain that the applicant failed to leave the starting blocks as it were, in paying homage, so to speak, to the mandatory requirements of rule 73. In the circumstances the only outcome, as a result of the non-compliance with rule 73, is for the application to be struck from the roll with costs, for failure to comply with the aforesaid mandatory provisions.

Order

[34] In the premises, the following order is issued:

3. The application is struck from the roll for want of compliance with the requirements of Rule 73(4)(a) and (b).

4. The Applicant is ordered to pay the costs of the application, where applicable, consequent upon the employment of one instructing and one instructed Counsel.

T.S Masuku
Judge

APPEARANCES:

APPLICANT: S. Namandje, with him Mr. Ndaitwah
Of Sisa Namandje & Co. Inc.

1st and 5th RESPONDENTS R. Ketjjere
Of Government Attorney

2nd RESPONDENT: G. Narib
Instructed by: Dr. Weder Kauta & Hoveka, Windhoek.

4th RESPONDENT: T. Muhongo,
Instructed by Appollos Shimakeleni Lawyers, Windhoek