



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2021/00185

In the matter between:

ONYEKA PROTECTION SERVICES

APPLICANT

and

**THE CHAIRPERSON OF THE CENTRAL
PROCUREMENT BOARD OF NAMIBIA
RESPONDENT**

1st

**THE CHAIRMAN OF THE REVIEW PANEL
OSHANA REGIONAL COUNCIL**

2nd RESPONDENT

AMUTANGA TRADING ENTERPRISES

3rd RESPONDENT

SIX THOUSAND SECURITY SERVICES

4th RESPONDENT

NELITO INVESTMENTS

5th RESPONDENT

LUDWIG SECURITY SERVICES

6th RESPONDENT

ONAMANGONGWA TRADING SERVICES

7th RESPONDENT

NAHOLE SECURITY SERVICES

8th RESPONDENT

OMBALA SECURITY SERVICES

9th RESPONDENT

CHIPPA TRADING ENTERPRISES

10th RESPONDENT

TRIPPLE ONE INVESTMENT CC

11th RESPONDENT

PELIO SECURITY SERVICES

12th RESPONDENT

AFRICA ROYAL INVESTMENT CC

13th RESPONDENT

OMEYA INVESTMENT

14th RESPONDENT

15th RESPONDENT

RUBICON SECURITY SERVICES	16th RESPONDENT
NAMIBIA PROTECTION SERVICES PTY LTD	17th RESPONDENT
KELELA SECURITY SERVICES	18th RESPONDENT
EXTRA DEFENCE PROTECTION SERVICES	19th RESPONDENT
CHIEF NANGOLO SECURITY SERVICES	20th RESPONDENT
SHIKUVULE TRADING CC	21st RESPONDENT
S.J FAMILY INVESTMENT CC	22nd RESPONDENT
SPLASH INVESTMENT CC	23rd RESPONDENT
ZENI INVESTMENT CC	24th RESPONDENT
ONNEPY PROTECTION SERVICES	25th RESPONDENT
JARDE SECURITY SERVICES	26th RESPONDENT
OMLE SECURITY SERVICES	27th RESPONDENT
MAYFIELD PROTECTION SERVICES	28th RESPONDENT
WINDHOEK SECURITY SERVICES	29th RESPONDENT
BERTHA SECURITY SERVICES	30th RESPONDENT
WAAKALI SECURITY SERVICES	31st RESPONDENT
C.I.S SECURITY SERVICES	32nd RESPONDENT
OMAMBUNDU SECURITY SERVICES	33rd RESPONDENT
P.I.S SECURITY SERVICES	34th RESPONDENT

Neutral citation: *Onyeka Protection Services v The Chairperson of the Central Procurement Board of Namibia and Others* (HC-MD-CIV-MOT-GEN-2021/00185) [2021] NAHCMD 285 (8 June 2021)

Coram: PARKER AJ
Heard: 19 May 2021
Delivered: 8 June 2021

Flynote: Administrative law – Administrative action – Review of decision of administrative body (Review Panel) responsible for granting statutory domestic remedy – In terms of the Public Procurement Act 15 of 2015 – Review application by applicant rejected opening the way for implementation of Review Panel's findings by the Procurement Board of Namibia – Applicant becoming one of a number of unsuccessful bidders for two tenders – In a r 66 (l) (c)-notice Review Panel informing court that any decision by this court would be academic – Counsel for Review Panel disclosing to court that first tender had been cancelled and contract of employment had been entered into between the public authority employer and successful bidder – Court accepting disclosures by counsel on basis of counsel's duty to court as officer of court to make such disclosure – Consequently, court dismissing application.

Summary: Administrative law – Administrative action – Review of decision of body (Review Panel) responsible for granting statutory domestic remedy – In terms of the Public Procurement Act 15 of 2015 – Review Panel rejecting applicant's review application to review Review Panel's findings – Way opened for the Procurement Board of Namibia to award two tenders to the successful bidder – Applicant praying court to review Review Panel's findings – In r 66 (1) (c)-notice Review Panel stating that first tender had been cancelled and contract of employment had been entered into between the third respondent employer and the successful bidder – Counsel for Review Panel disclosing to court that first tender had been cancelled and contract of employment concluded between public authority employer and successful bidder – Court rejecting applicant's counsel's argument that in the absence any answering affidavit to that effect court should reject counsel's disclosures and accept applicant's affidavit and grant the order for review sought – Court rejecting counsel's argument and accepting facts disclosed by second respondent's counsel on the basis that as officer of court counsel she had the duty to inform the court of any matter which is material to the granting or refusal of the application – Consequently, court dismissing application.

ORDER

- (1) The application is dismissed.
 - (2) There is no order as to costs.
 - (3) The matter is considered finalised and is removed from the roll.
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JUDGMENT

PARKER AJ

[1] We are confronted once again with another challenge in the tender business which has now become a big industry of its own in the country. The tender award challenges have now become humdrum.

[2] Be that as it may, it becomes our duty to always entertain such applications and do justice to the parties. The notice of motion in the present matter contains precise description of the parties. I need not repeat them here. Suffice to mention that third respondent is the employer in the two tenders: No. NCS/ONB/ONARC-027/2020/2021, and NCS/ONB/ONARCDEAC-022/2020/2021, which are the subject matter of this case. The first respondent's body is the central organization in terms of the Procurement Act 15 of 2015 for the procurement of goods and services by public authorities. The second respondent is the chairperson (Chairman) of the statutory domestic remedy body of the Central Procurement Board whose chairperson, as I have indicated, is the first respondent. Applicant is one of the unsuccessful bidders.

[3] In the exercise of its statutory powers, the body of second respondent, that is, the Review Panel, rejected applicant's application to review the Review Panel's adverse findings. The Review Panel communicated those findings to applicant on 6 May 2021. Applicant has brought the instant application to review and set aside the Review Panel's decision and remit it to that body to determine afresh applicant's

review application; and applicant prays the court to hear the application on the basis that it is urgent.

[4] Second respondent has moved to reject the application. It is remembered that the matter was set down for 17 May 2021 for hearing but was postponed to 19 May 2021. Meanwhile, second respondent pursued its opposition not by way of r 66 (1) (a) and (b) of the rules of court, but by way of r 66 (1) (c) by raising questions of law only.

[5] In their r 66 (1) (c)-notice, the Review Panel places before the court these distinct issues: (1) an academic relief sought, (2) lack of urgency, and (3) improper procedure: non-compliance with r 76 of the rules of court. For plainly obvious reasons, I shall consider the notice in respect of issue (1) of the notice first.

[6] In her oral submission to the court, Ms Ndungula disclosed to the court that as respects tender no. NCS/ONB/ONARC-027/2020/2021, which was for the provision of security services for third respondent, that tender was cancelled on 17 May 2021; and as respects tender no. NCS/ONB/ONARD-DEAC-022/2020/2021 for the provision of security services for third respondent's Education Directorate, the contract in respect thereof was awarded on 30 March 2021 and the contract with the employee (that is, the successful bidder) was concluded on 14 May 2021. If Ms Ndungula's submission was accepted, that would be the end of the matter; for it is trite the court does not grant orders that are academic.

[7] The submission on the other way by Mr Diedericks, counsel for applicant, is that since second respondent has not presented any evidence by way of an answering affidavit, the court should reject the statements in the r 66 (1) (c)-notice that were articulated in elucidation by Ms Ndungula in her oral submission, and determine the application on the basis of applicant's founding papers. With respect, I should say, Mr Diedericks oversimplifies the issue, and he has an unsurmountable obstacle in his way. Counsel overlooks the principle that it is the duty of counsel to the court in judicial proceedings 'to inform the court of any matter which is material to the granting of an application, and of which counsel is aware'. (*Schoeman v Thompson* 1927 WLD 282 at 283; see also Eric Morris *Technique of Litigation* 3rd ed

(1985) at 40-41 on 'The Duty of Disclosure to the Court'.) Thus, in virtue of the foregoing *Schoeman v Thompson* principle, I hold that '[t]he court will always accept and act on the assurance of counsel in any matter heard in court....' (Eric Morris *Technique of Litigation* at 41).

[8] Anybody who is familiar with the court would, if they are minded to do so, attest to the fact that on occasions too many to count, the court has accepted and acted on disclosures by counsel in motion proceedings without demanding proof thereof by affidavit. Such disclosures by counsel do not constitute inadmissible hearsay evidence. In the instant case, the matter Ms Ndungula disclosed to the court as officer of the court and pursuant to her duty to the court is material (see *Schoeman v Thompson*, loc cit, and has probative value. It is relevant matter; and it applies to the case at hand and does contribute to the determination of the matter the court is seized with (see *Vaatz v Law Society of Namibia* 1990 NR 332 (HC).)

[9] Indeed, that matter is material and sufficient, and second respondent can rely on it to resist the application in the circumstances of the case. Therefore, the fact that the matter placed before the court by Ms Ndungula is not presented to the court in an affidavit of her client, the second respondent, matters tuppence: It is of no moment, considering the circumstances of the case and the relief sought by the applicant. Different consideration would, of course, arise, if applicant's founding and replying papers were capable of contradicting, or putting in dispute the veracity of, the matter placed before the court by Ms Ndungula.

[10] Based on these reasons, it is otiose to consider any other issues from both sides of the suit. And it will, in virtue of what I have discussed previously, make no sense – none at all – if the court were not to consider the matter now; and so, whether urgency is proved or not is plainly inconsequential.

[11] Ms Ndungula submitted that the cancellation of the first tender and the conclusion of contract of employment in respect of the second tender had been communicated to applicant. Mr Diedericks submitted that it was not proper for the third respondent to have acted as such after the application had been filed. That may be so, but it remains true that any order the court makes now to upset the decision of

the Review Panel would undoubtedly be academic, as Ms Ndungula submitted. In that regard, it is important to note this. While exhausting domestic statutory remedy, as it did, applicant could have approached the court on the basis of urgency to have the implementation of the Review Panel's findings suspended pending the review thereof. I accept Ms Ndungula's submission on the point. Applicant failed to do that, much to its detriment. Applicant has itself to blame for the predicament in which it finds itself. It is clearly too late in the day to review the findings of the Review Panel.

[12] It remains to consider the matter of costs. What the court can do in the circumstances, including the cancellation of the first tender and the conclusion of the employment contract in respect of the second tender when it would appear the instant application had been instituted when those acts were carried out, is to refuse to grant costs in favour of second respondent, even though second respondent has been successful.

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

- (1) The application is dismissed.
- (2) There is no order as to costs.
- (3) The matter is considered finalised and is removed from the roll.

C PARKER
Acting Judge

APPEARANCES

APPLICANT

J DIEDERICKS

Instructed by Shakumu and Co. Inc.,
Windhoek

1ST RESPONDENT

A NDUNGULA

Instructed by Office of the
Government Attorney, Windhoek