

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2021/00294

In the matter between:

BERTHA SECURITY SERVICES CC

APPLICANT

and

CHAIRPERSON OF REVIEW PANEL

1ST RESPONDENT

PUBLIC PROCUREMENT REVIEW PANEL

2ND RESPONDENT

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

3RD RESPONDENT

CENTRAL PROCUREMENT BOARD

4TH RESPONDENT

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

5TH RESPONDENT

VICMAC SECURITY SERVICES CC

6TH RESPONDENT

OMBANDJE SECURITY SERVICES CC

7TH RESPONDENT

WINDHOEK SECURITY SERVICES CC

8TH RESPONDENT

OVAKUATJIVI TRADING ENTERPRISES CC

9TH RESPONDENT

KHAIBASEN SECURITY SERVICES CC

10TH RESPONDENT

PREMIER INVESTMENT NO. 25 CC

11TH RESPONDENT

OMEYA INVESTMENTS CC

12TH RESPONDENT

INDEPENDENT SECURITY SERVICES CC

13TH RESPONDENT

MUKWE SECURITY SERVICES CC

14TH RESPONDENT

NELITO INVESTMENTS CC

15TH RESPONDENT

NAMIBIA PROTECTION SERVICES (PTY) LTD

16TH RESPONDENT

TRIPLE ONE INVESTMENTS CC

17TH RESPONDENT

SHIKUVULE TRADING CC	18TH RESPONDENT
SPLASH INVESTMENTS CC	19TH RESPONDENT
CIS SECURITY SERVICES CC	20TH RESPONDENT
ELI TJIOOLA TRADING ENTERPRISES CC	21ST RESPONDENT
GORESEB TRADING CC	22ND RESPONDENT
SALAMBALA INVESTMENTS CC	23RD RESPONDENT
AFRICAN KING SERVICES CC	24TH RESPONDENT
MARRY'S PROTECTION SERVICES CC	25TH RESPONDENT
AMON SN INVESTMENTS CC	26TH RESPONDENT
MAMPI SECURITY SERVICES CC	27TH RESPONDENT
SPARK SECURITY SERVICES CC	28TH RESPONDENT
SECURITY TRAINING COLLEGE OF NAMIBIA CC	29TH RESPONDENT
NAMIBIA PEOPLES PROTECTION SERVICES CC	30TH RESPONDENT
CHIPPA TRADING ENTERPRISES CC	31ST RESPONDENT
SIRKA INVESTMENTS CC	32ND RESPONDENT
STEFMORY INVESTMENTS CC	33RD RESPONDENT
MAYFIELD PROTECTION SERVICES CC	34TH RESPONDENT
DONNY INVESTMENTS CC	35TH RESPONDENT
NAKAYE TRADING CC	36TH RESPONDENT
ROYAL SECURITY SERVICES CC	37TH RESPONDENT
KAVIOMBO TRADING ENTERPRISES CC	38TH RESPONDENT
NANGURA SECURITY SERVICES CC	39TH RESPONDENT
CHIEF NANGOLO SECURITY SERVICES CC	40TH RESPONDENT
MBUSHA SECURITY SERVICES CC	41ST RESPONDENT
ONAMAGONGWA TRADING ENTERPRISES CC	42ND RESPONDENT
THREE STARS SECURITY SERVICES CC	43RD RESPONDENT
NJANGULA TRADING CC	44TH RESPONDENT
SHINE TECHNOLOGIES SOLUTIONS (PTY) LTD	45TH RESPONDENT
SNIFFERDOG INVESTIGATION AGENCY & SECURITY SERVICES CC	46TH RESPONDENT
OMATUNGO SECURITY SERVICES CC	47TH RESPONDENT
PIS SECURITY SERVICES CC	48TH RESPONDENT
EILANDS WEIDE INVESTMENTS CC	49TH RESPONDENT
REFLECTOR TRADING ENTERPRISES CC	50TH RESPONDENT
NDK INVESTMENT CC	51ST RESPONDENT

JUPITER SECURITY CC	52 ND RESPONDENT
KIMPERT INVESTMENTS CC	53 RD RESPONDENT
AFRICA INVESTMENTS CC	54 TH RESPONDENT
MPUNGU SECURITY CC	55 TH RESPONDENT
IML TRADING ENTERPRISES CC	56 TH RESPONDENT
TULIKUMO INVESTMENT CC	57 TH RESPONDENT
CHRIPHER INVESTMENT CC	58 TH RESPONDENT
EASS INVESTMENT CC	59 TH RESPONDENT
ALERT SECURITY SERVICES CC	60 TH RESPONDENT
NICO SECURITY SERVICES CC	61 ST RESPONDENT
OMUMBUDU SECURITY SERVICES CC	62 ND RESPONDENT
WAAKALI SECURITY SERVICES CC	63 RD RESPONDENT
VIHINDA INVESTMENTS CC	64 TH RESPONDENT
KANGARU TRADING EXPRESS CC	65 TH RESPONDENT
MBITJITA KUNENE INVESTMENT CC	66 TH RESPONDENT
NGATUKONDJE TRADING CC	67 TH RESPONDENT
OMLE SECURITY SERVICES CC	68 TH RESPONDENT
TORRA INVESTMENT CC	69 TH RESPONDENT
COMMANDO SECURITY GROUP CC	70 TH RESPONDENT
OZETU SECURITY SERVICES (PTY) LTD	71 ST RESPONDENT
OTJISEPUA TRADING CC	72 ND RESPONDENT
G M SECURITY SERVICES CC	73 RD RESPONDENT
SHILIMELA SECURITY AND DEBT COLLECTION CC	74 TH RESPONDENT
MGEE'S INVESTMENT CC	75 TH RESPONDENT
SHIMWE TRADING ENTERPRISES CC	76 TH RESPONDENT
KARUPMBURA TRADING ENTERPRISES CC	77 TH RESPONDENT
EXTRA DEFENCE PROTECTION SERVICES CC	78 TH RESPONDENT
JARDE INVESTMENT CC	79 TH RESPONDENT
TSARAS TRADING ENTERPRISES	80 TH RESPONDENT
AMUTANGA TRADING ENTERPRISES CC	81 ST RESPONDENT
NKASA SECUIRTY SERVICES	82 ND RESPONDENT
FAN INVESTMENT CC	83 RD RESPONDENT
TYANHWE SECURITY FORCE	84 TH RESPONDENT
TRIPPLE SAFETY SECURITIES CC	85 TH RESPONDENT

Neutral citation: *Bertha Security Services CC v Chairperson of the Review Panel*
(HC-MD-CIV-MOT-REV-2021/00294) [2021] NAHCMD 391 (27
August 2021)

Coram: ANGULA DJP
Heard: 5 August 2021
Delivered: 27 August 2021

Flynote: Applications and motions – Urgent application – Rule 73(4) – Main application – Struck from the roll for lack of urgency – Counter-application – Also struck from the roll for lack urgency.

Summary: This is an opposed urgent application challenging the decision of the Central Procurement Board to disqualify the applicant's bid – Namibia Protection Services (Pty) Ltd, the sixteenth respondent filed a counter-application challenging the board's decision for having awarded it lot number 11 instead of lot number 1 which is bigger than lot number 11.

Held; that the urgency in respect of the main application, if any, is self-created.

Held; that it is an impermissible practice for a litigant to attach a pleading (being a founding affidavit) from a different matter, to its founding affidavit in this matter and to request the court to read such affidavit as if incorporated in its entirety without directing the court to any specific portions of such attached document.

Held; that the founding affidavit in respect of the counter-application did not set out averments necessary to make out a case for urgency.

ORDER

Ad main urgent application:

1. The point *in limine* of non-joinder of the Social Security Commission is dismissed.
2. The urgent application is struck from the roll for want of urgency.

Ad Urgent counter-application:

1. The urgent counter-application is likewise struck from the roll for want of urgency.

Ad both applications:

1. The applicant must pay, in respect of the main urgent application, the costs of the third, fourth, sixth and fourteenth respondents. In respect of the third and fourth respondents, such costs shall include the costs of one instructed and one instructing legal practitioner. In respect of the sixth and fourteenth respondents, the costs shall be for one legal practitioner.
2. In respect of the urgent counter-application, the sixteenth respondent must pay the costs of the third and fourth respondents, such costs to include the costs of one instructed and one instructing legal practitioner.
3. The matter is removed from the roll and regarded finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an opposed urgent application in terms whereof the applicant seeks the following relief -

1. An order in terms whereof the applicant's non-compliance with rule 73(1), (3) and (4) of Court, in so far as it pertains to the form and service of this application is condoned, and this application is heard as one of urgency.
2. An order in terms whereof applicant's service of this application in a manner other than contemplated in rule 8 of the Rules of this Courts is condoned.
3. An order in terms whereof, pending the final adjudication and determination of this application, the 3rd and 5th respondents are restrained and interdicted from implementing (including the awarding and conclusion of contract) the first and the second respondents decision dated 09 July 2021, that: ". . . in accordance with section 60(e) of the Public Procurement Act, the decision of the First Respondent (Central Procurement Board) is hereby confirmed, and as such the First Respondent should proceed towards finality of this procurement process" ("decision").
4. An order in terms whereof, pending the final adjudication of this application, the respondents 6th to 19th respondents, respondents are restricted and interdicted from executing work under the procurement reference number NCS-ONB-CPBN-05/2019.
5. An order in terms whereof, any contract that may have been concluded between the 3rd to the 5th respondents with the 6th to 19th respondents, pursuant to the procurement under reference number NCS-ONB-CPBN-05/2019 is – consequent to paragraphs 5 and 6 hereof declared null and void and accordingly set aside.
6. An order in terms whereof the first respondent's decision dated 09 July 2021, is reviewed and set aside.
7. An order in terms whereof the first and the second respondents' decision dated 09 July 2021 is declared null and void of any legal consequences.
8. An order in terms whereof this matter is remitted back to the first and the second respondents for a re-hearing, alternatively, the third and the fourth respondents for the re-evaluation of the bids submitted in the procurement under reference number: NCS-ONB-CPBN-05/2019.

9. An order in terms whereof the respondents electing to oppose this application are ordered and directed to pay the applicant's costs, being the cost of one instructing and one instructed legal practitioner.
10. Further or alternative relief.'

[2] The sixteenth respondent has also brought a counter-application, but I will only deal with that after the main application brought by the applicant.

The parties

[3] The applicant is Bertha Security Services CC, a close corporation, registered in terms of the close corporation laws of the Republic of Namibia, engaged in the (extremely competitive) business of rendering security services, with its principal place of business located at Fuulukulo, Oshakati Main Road, Oshakati, in the Republic of Namibia.

[4] The first respondent is the Chairperson of the Review Panel, a major person appointed in terms of s 58(2) of the Procurement Act, 15 of 2015 (the 'Act') with his or her office located in Moltke Street, Windhoek, care of the Government Attorney, 2nd Floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[5] The second respondent is the Review Panel, a statutory body, established in terms of s 58 of the Public Procurement Act, 15 of 2015 with its office located at Moltke Street, Windhoek, care of the Government Attorney, 2nd floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[6] The third respondent is the Chairperson of the Central Procurement Board, a major person, appointed in terms of s 11(2)(a) of the Public Procurement Act, 15 of 2015, with his or her office located at Mandume Park 1, Teinert Street, Windhoek, in the care of the Government Attorney, 2nd floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[7] The fourth respondent is the Central Procurement Board, a statutory body, established in terms of s 8 of the Public Procurement Act, 15 of 2015, with its office located at Mandume Park 1, Teinert Street, Windhoek, care of the Government Attorney, 2nd floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[8] The fifth respondent is the Government of the Republic of Namibia, herein represented by the Minister of Health and Social Services, alternatively, the Executive Director in the in the Ministry of Health and Social Services located at 123 Robert Mugabe Avenue, Windhoek, care of the Government Attorney, 2nd floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[9] The sixth respondent is a close corporation registered in terms of the close corporation laws of Namibia, with their addresses listed in Annexure "A" to the founding affidavit.

[10] The rest of the respondents are tenderers/close corporations/companies registered in terms of the close corporations/companies laws of the Republic of Namibia, with their addresses listed in Annexure 'A' to the founding affidavit.

[11] The third, fourth, sixth, fourteenth and sixteenth respondents opposed and filed their respective answering affidavits. The sixteenth respondent indicated that it supported the applicant's application. It however filed a counter application. The counter-application was opposed by the third and fourth respondents.

[12] The applicant was represented by Mr Muhongo whilst the third and fourth respondents were represented by Mr Chibwana. Sixth and fourteenth respondents were represented by Mr Tjajara whilst sixteenth respondent was represented by Mr Jacobs.

Brief background

[13] In January 2020, an invitation for bids titled 'Rendering of Social Security Services for the Ministry of Health and Social Services under procurement reference number NCS-ONB-CPBN-05/2019' was advertised. The deadline for submission of

bids was initially 4 March 2020, but was extended to 20 July 2020 for reasons not relevant to this application.

[14] On 5 November 2020, a notice of selection of award was issued by the fourth respondent ('the Board') under the aforesaid procurement reference number NCS-ONB-CPBN-05/2019 in terms of s 55 and regulation 38.¹ The notice was dated 05 November 2020 and was addressed to the successful bidders as well as the unsuccessful bidders.

[15] The notice of selection of award dated 05 November 2021, informed the unsuccessful bidders, which included the applicant that they were unsuccessful bidders and further that should they take issue with the selection, they may file an application for review of its disqualification within seven days starting 10 November 2020 at 08:00 to 16 November 2020 at 17:00. The notice further informed the bidders that should there be no application for review, the tenders would be awarded by the accounting officer to the successful bidders.

[16] The reason for the applicant's bid being rejected was that it had submitted an invalid social security good standing certificate ('good standing certificate'). From the Executive Summary of the Bid Evaluation Report, it appears that the applicant's good standing certificate was issued on 9 June 2020 and expired on 9 July 2020. For that reason the applicant's bid was disqualified. The applicant did not apply for review of board's decision by 16 November 2020 as advised in the notice of selection of award.

[17] Other unsuccessful bidders applied for review. The sixteenth respondent also applied for review of the decision of the board to allocate to it lot No. 1 instead of lot No. 11 which was bigger. That review was heard on 26 November 2020 and the Review Panel made an order the same day. Upon re-evaluation, a revised notice of selection of award was issued on 3 June 2021 by the board. Thereafter, the applicant applied to the review panel for the re-consideration of its bid contending that the good standing certificate has no expiration date and was therefore valid. This review application to the review panel was filed on 14 June 2021.² The board

¹ See annexure "PPS1" to the third and fourth respondents' answering affidavit.

² See annexure "C" to the applicant's founding affidavit.

opposed that review application. On 9 July 2021, the Review Panel upheld the decision of the board holding that:

- '1. The Review Panel observed that the first and second Applicants were disqualified because of the Social Security Commission Good Standing Certificates. The first and second Applicants were part of the review that was held on the 26 November 2020 but that was the reason they were disqualified concerning the Social Security Good Standing Certificate were already made to them by then they choose not to raise it and in an event that they have raised the issue and the Review Panel omitted them, they have gone to the high court to challenge the decision and they have not done so therefore they cannot come belated and want the Review Panel to deal with the same issue on the information that was before it already about none months ago.'³

[18] Aggrieved by the decision in the immediate preceding paragraph, the applicant launched the present application before this court on urgent basis.

[19] As indicated earlier this application is opposed by the third, fourth, sixth and fourteenth respondents. Sixteenth respondent supports this application. The grounds of opposition in summation are (a) non-joinder of the Social Security Commission, (b) the issue of urgency; and (c) that the relief sought cannot be granted. I will consider these issues in this sequence.

Non-joinder of Social Security Commission

The versions by the parties

[20] It was submitted on behalf of the sixth and fourteenth respondents that Social Security Commission ought to have been joined as a party to these proceedings as the issue regarding the period of validity of the Good Standing Certificate ('the certificate') if any can only be explained by Social Security Commission. According to the sixth and fourteenth respondents, this non-joinder is fatal to the applicant's case.

[21] The other respondents who opposed the application did not make common cause with the sixth and fourteenth respondents on this point. The applicant in

³ Review Panel decision of 9 July 2021 annexed to the applicant's founding affidavit and marked "E".

response argued, that Social Security Commission does not have a direct or substantial interest in the outcome of this matter.

The law and analysis

[22] In *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 Damaseb JP stated at 447 E-G that:

'The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion from the litigation. Clearly, the ratio in Amalgamated Engineering Union is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court has a direct and substantial interest in the matter and should be joined as a party.⁴ [Underlined for emphasis]

[23] I am in agreement with the applicant insofar as this point is concerned. On the papers before me, a case has not been made out to the effect that, Social Security Commission has direct and substantial interest in any order sought by the parties. A case has also not been made out to justify a conclusion that Social Security Commission has legal interest(s) in the subject matter of this application and that such legal interest might be prejudicially affected by the decision of this court. It is for these reasons that this point stands to fail.

Urgency

The versions by the parties

[24] The applicant explained that it approached this court on urgent basis on account of the Review Panel's decision of 9 July 2021, when it dismissed the

⁴ See also *Council of Itireleng Village Community v Madi* (A 287/2011) [2013] NAHCMD 363 (29 November 2013).

applicant's application for review lodged in June 2021. Further, that the first and second respondents' failure to undertake that they would hold the procurement process in abeyance pending a challenge of the Review Panel's decision of 9 July 2021 made the matter urgent. The applicant also advanced an argument that it takes approximately six months for opposed motions to be finalized and as such it could not approach this court in the ordinary course as it might after six months become a mere academic exercise.

[25] In opposition the third and fourth respondents argued that, the applicant had already on 5 November 2020 had knowledge of the initial notice of selection of award which informed it that its bid was unsuccessful on account of an invalid good standing certificate. That the applicant at its own peril opted not to apply for review of the said award within seven days as set out in that notice of selection of award and only applied for review in June 2021. The third and fourth respondents argue that, even if it is that there is urgency that urgency is self-created. The third and fourth respondents rely on *Bergmann v Commercial Bank of Namibia*⁵ in support of their arguments.

[26] Further that in explaining the urgency, the applicant only begins to explain the events as they unfolded as from 9 July 2021. The applicant, according the third and fourth respondents has failed to explain its failure to challenge its disqualification starting from November 2020 up until 9 July 2021.

[27] The sixth and fourteenth respondents in addition argued in opposition to the applicant's case on urgency that the applicant does not set out in its papers why it cannot approach the court for damages in due course.

[28] In reply, the applicant merely directs the court's attention to paras 35-54 of its founding affidavit and merely states that insofar as the argument about its failure to challenge is disqualification already in November 2020 is concerned, that argument is 'neither here nor there'. The applicant then goes on to state that it had in any event never waived its right to challenge the decision disqualifying its bid.

The law and analysis

⁵ *Bergmann v Commercial Bank of Namibia* [2000] NAHC 25 (6 November 2000).

[29] Rule 73 of the Rules of this Court prescribes a two legged requirements which the court must apply in determining the issue of urgency. These two requirements have now become trite in this jurisdiction, but I will quote the relevant portion of the rule for completeness.

[30] Rule 73(4) provides that -

‘(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.’

[31] In *Bergmann v Commercial Bank of Namibia*⁶ Maritz J as he then was opined that, ‘One of the circumstances under which a Court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either *mala fides* or through his or her culpable remissness or inaction. . . . 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.’

[32] Whilst the *Bergmann v Commercial Bank of Namibia* matter dealt with rule 6 which is the rule that governed urgent applications before the amendment of the rules and the coming into force of the current rules, the two rules are in essence mirror images of each other. I therefore associate myself with the sentiments of the court in that matter, insofar as the reluctance of the courts to come to the aid of an applicant who has created its own urgency is concerned.

[33] In *Nghiimbwasha v Minister of Justice (A 38/2015)* [2015] NAHCMD 67 (20 March 2015), Masuku AJ as he then was, held that the requirements set out in rule 73(4) as quoted in para [28] above is mandatory. The learned Judge explained that-

⁶ Ibid.

[11] I now revert to the relevant subrule. The first thing to note is that the said rule is couched in peremptory language regarding what a litigant who wishes to approach the court on urgency must do. That the language employed is mandatory in nature can be deduced from the use of the word “must” in rule 73 (4). In this regard, two requirements are placed on an applicant regarding necessary allegations to be made in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of the burden cast may result in the application for the matter to be enrolled on urgency being refused [underlined for emphasis].

[12] The first allegation the applicant must “explicitly” make in the affidavit relates to the circumstances alleged to render the matter urgent. Second, the applicant must “explicitly” state the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course. The use of the word “explicitly”, it is my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to set out and underscore the level of disclosure that must be made by an applicant in such cases [underlined for emphasis].

[13] In the English dictionary, the word “explicit” connotes something “stated clearly and in detail, leaving no room for confusion or doubt.” This therefore means that a deponent to an affidavit in which urgency is claimed or alleged, must state the reasons alleged for the urgency “clearly and in detail, leaving no room for confusion or doubt”. This, to my mind, denotes a very high, honest and comprehensive standard of disclosure, which in a sense results in the deponent taking the court fully in his or her confidence; neither hiding nor hoarding any relevant and necessary information relevant to the issue of urgency.’ [Underlined for emphasis]

[34] From the applicant’s founding affidavit it is crystal clear that the applicant did not take the court into full confidence and did not mention that it had knowledge of the disqualification of its bid already on 05 November 2020 on account of an invalid Social Security Good Standing Certificate. It did not take the court into full confidence that it had failed to exercise its right to apply for review within 7 days from 10 November 2020 to 16 November 2020 as set out in the notice of selection award of November 2020. The applicant does not inform the court of the reasons why it did not exercise this right. It also does not take the court into confidence regarding the period November 2020 to 9 July 2021. In its replying affidavit, the applicant merely shrugs its shoulders and avers that its failure to challenge the disqualification of its

bid already in November 2020 'is neither here nor there' and restates what it said in its founding affidavit.

[35] Why should this court allow a litigant to jump the queue, when such litigant clearly was not entirely open and honest with the court regarding the circumstances which render this application urgent, in their opinion? Relief sought on urgent basis is not to be had for the asking. 'The applicant is seeking an indulgence of the court, which the court may grant or refuse to a larger or lesser extent, if at all in its discretion'⁷. I am of the considered view that the failure by the applicant to explicitly set out the facts that render this matter urgent and particularly its silence regarding the period November 2020 to 9 July 2021 is to its own peril.

[36] Regarding the second leg of the test in rule 73(4), I understand the applicant's averment to be that should it approach this court in the ordinary course, it would take approximately six months for the matter to be finalized and at that stage, any determination of this court would be academic. I agree with the third and fourth respondents, that the apparent urgency of this matter at this stage is self-created. I say so because, had the applicant applied for review already in November 2020 as was communicated to it and which it does not deny, the Review Panel would have already at that stage had the opportunity to consider the issue of the validity or otherwise of the good standing certificate. This could have either led to a decision for or against it. In the event that the ruling of the Review Panel would have been against it, the applicant could have applied to this court on an urgent basis much earlier in the year. Or it would at the very least have demonstrated to this court that the applicant had not remained idle until 9 July 2021, but had been engaged in the procedures prescribed by the Public Procurement Act, 15 of 2015 and the regulations made under the Act.

[37] I therefore am of the considered view that the applicant failed to make out a case that this matter is urgent and even if it is, such urgency is self-created.

⁷ *Esau v Magistrate of Windhoek* (HC-MD-CIV-MOT-GEN-2019/00490) [2019] NAHCMD 558 (27 December 2019) para 21.

[38] Considering my finding on the issue of urgency, I will not proceed to deal with the merits. I will now turn to the counter-application by the sixteenth respondent ('NPS').

Counter-application

[39] The NPS was a successful bidder and was awarded lot number 11 which is bigger than lot number 1. It was thus the unsuccessful bidder for lot 1. NPS however is of the view that it was the lowest bidder and should have been awarded lot 1 as such allocation would have given the Ministry of Health and Social Services or Government of the Republic of Namibia the greatest value for money. With this counter application NPS seeks inter alia an order remitting the matter to the board for re-evaluation of the bids. In its notice of motion it seeks the following relief:

1. The 16th respondent's non-compliance with the forms and service provided for by the Rules of this Honourable Court is condoned and the matter is heard as one of urgency as contemplated by rule 73.
2. The 1st and 2nd respondent's decision dated 9 July 2021 is reviewed and set aside and the matter is referred back to the 3rd and 4th respondent for the reevaluation of all bids subject to the directions set out in paragraph 3 hereof.
3. It is declared that section 55(1) read with section 2(a)(i) of the Public Procurement Act, 15 of 2015, require that in awarding separate sections of one bid to different bidders, the selection of the bidders must be done so that the awarding of the separate sections, viewed as a whole, obtains best value for government expenditure.
4. It is declared that section 51(4) read with section 52(5) of the Public Procurement Act, 2015, require that every bidder be provided with the name of a bidder and the total amount of each bid and, where an arithmetical error has been corrected, also the total corrected amount of each bid.
5. The 3rd and 4th respondents are ordered, with respect to bid NCS/ONB/CPBN-05/2019, to provide the 16th respondent, with respect to all 80 bidders, the name

and the total corrected amount of each bid alternatively the unit price of every bidder, for each and every of the three years and for each and every one of the 13 lots.

6. The 3rd and 4th respondents are ordered, together with those parties who oppose this counter-application, to pay the 16th respondent's costs of bringing this counter-application, including one instructing and one instructed counsel, and including those costs of drafting the papers in case number: HC-MD-CIV-MOT-GEN2021/00300.
7. Further and/or alternative relief.

[40] For purposes of context, it is necessary to mention that when NPS was informed that it was a successful bidder in respect of lot number 11 instead of lot 1 which was comparatively larger than lot 11 despite its bid being lower than that of the sixth respondent who was awarded lot 1, it applied for a review in November 2020. The NPS's gripe is that it was the lowest bidder for lot 1 and both it as well as the sixth respondent were the lowest bidders in respect of lot 11, but that the board awarded it lot 11 instead of lot 1 for which it was the lowest bidder. The board it would appear, agreed with sixteenth respondent, however the Review Panel found that-

'The bidding documents [stipulated] that no more than one lot will be awarded to a bidder. The first respondent (the Board) proceeded in the manner consistent with the above and awarded to the Applicant one of the lots for which the Applicant qualified.'

[41] The complete decision of the Review Panel of 9 July 2021 was emailed to the bidders on 21 July 2021. On 23 July 2021, the applicant sought an undertaking that the procurement process be kept in abeyance pending a challenge in this court. NPS alleges that it had, since the award became available, consistently requested the board to provide it with prices for successful bidders for years two and three as well as the prices of qualifying bidders on all the lots and the prices of the disqualified bidders. NPS brought an urgent application on 28 July 2021, the court hearing that application, according to NPS found that NPS would have substantial redress in the present application before me.

[42] It is the third and fourth respondents' submission that NPS has not filed a founding affidavit in support of its counter application, but that it merely relied for its application on an annexure which was the founding affidavit in the urgent application of 28 July 2021 which served before a different court.

[43] Third and fourth respondents argued that the 'wholesale incorporation of an annexure as founding affidavit' without specifying what specific portion of the annexure is relied upon is inappropriate and referred to *Nelumbo and Others v Shikumwah and Others* (SA 2015/27) [2017] NASC 14 (13 April 2017).

Law and analysis

[44] Rule 69(2) of the rules of this court provides in respect of counter applications that – 'The periods prescribed with regard to applications apply with necessary modifications required by the context to counter-applications, except that the court may, on good cause shown, postpone the hearing of a counter-application.' The counter application in this urgent application too must meet the requirements of rule 73. In that, it too must be accompanied by a founding affidavit wherein it must satisfy the two requirements for urgency firstly, before it even attempts to deal with the merits. Needless to say, as is customary in application proceedings, the counter-application would stand or fall on its founding affidavit.

[45] In *Nelumbo and Others* (supra), the Supreme Court of had the following to say at paras [40] – [42]. Since affidavits constitute both the pleadings and the evidence in motion proceedings, a party must make sure that all the evidence necessary to support its case is included in the affidavit: *Stipp & Another v Shade Centre & Others* 2007 (2) NR 627 (SC) at 634G-H. In other words, the affidavits must contain all the averments necessary to sustain a cause of action or a defence. . . . When reliance is placed on material contained in annexures, the affidavits must clearly state what portions in the accompanying annexures the deponent relies on. It is not sufficient merely to attach supporting documents and to expect the opponent and the court to draw conclusions from them. In *Minister of Land Affairs and Agriculture v D & F Wevell Trust* Cloete JA reasoned that:⁸

⁸ *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184.

'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. . . . A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush is not permitted.'⁹

[46] In the present matter, NPS had not made averments in the document filed as its founding affidavit in the counter application, but merely referred to the annexure(s) which was the founding affidavit and annexures it had prepared for the application that was heard on 28 July 2021 by a different court. NPS in para 13 of its so-called founding affidavit merely stated that: 'I incorporate the content of the annexed papers as fully as if they were now entirely quoted in this affidavit by me. All the facts relevant to the determination of the additional relief are therefore now before court for determination in the counter-application.' In response to the criticism levelled against this type of pleading by the third and fourth respondents, NPS merely averred that it denies all allegations made by those respondents to the extent that they are at variance with those found in its founding affidavit.

[47] NPS, as correctly pointed out by the third and fourth respondents has adopted an impermissible approach to its counter-application. Even, its replying affidavit is nothing short of a bare denial in general. I would have expected NPS to at least deal with the challenge regarding the issue of its reliance for its application on annexures (including the founding affidavit in a previous application) without setting out its case in the document it filed as founding affidavit for this counter-application, but this it did not do.

[48] Considering that this is a counter-application to an urgent application, surely the applicant could not expect of this court to trawl through all the annexures to determine what portion of the founding affidavit of the previous application was relevant for this case and to what extent. This would in essence be tantamount to this court doing the NPS's job and would amount to this court building a case for NPS.

⁹ *Minister of Land Affairs and Agriculture* at 200C–E.

[49] An applicant's founding affidavit is not only a pleading, it is its evidence and an applicant's case stands or falls by its founding affidavit. The document titled 'founding affidavit' did not allege facts necessary to sustain a cause of action. The approach taken by the NPS was not only careless, but constitutes trial by ambush. It is unfair to expect this court to try and make sense of all the annexures to determine which facts and evidence would be necessary to sustain a cause of action for NPS's counter-application.

[50] Rule 65(1) of the rules of this court provides in part that: 'Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief.' I am of the considered view that, the founding affidavit in support of the counter-application does not set out facts on which this court could determine whether to grant or decline the relief sought.

[51] It appears that NPS already knew on 28 July 2021, when it brought its urgent application or at least after that court ruled that it (the 'NPS') would have substantial redress in the present urgent application, that this application was due and ought to have prepared papers in compliance with the rules of court and fair play. Its failure to prepare a proper rule compliant founding affidavit and its failure to refer the court to specific portions of its annexures, but instead expecting the court to build its case from all the annexures was at its own peril.

[52] Under these circumstances, I am not satisfied that the two legged peremptory requirements for urgency were satisfied. And although in its notice of motion, the NPS seeks an order condoning its non-compliance with forms and service as provided for by the rules of court, the applicant did not lay any basis in the founding affidavit to justify the court dispensing with the forms and services as prayed for in its notice of motion. All NPS did was say to this court, I have annexed a founding affidavit and annexures which I prepared for a previous urgent application, I will not prepare a founding affidavit for this application so you should incorporate all those annexures and try and see what relief you can grant me. This approach taken by NPS is an unacceptable approach to pleading a case and it is most inconvenient and unfair to a court particularly, when that court is expected to determine the matter on urgent basis.

[53] NPS was aware that this urgent application was due at least on the day the court in its previous urgent application struck the matter. There is no excuse why it did not prepare papers for this application.

[54] For those reasons and considerations the counter-application stands to be struck from the roll for the reason that NPS failed to make out a case for urgency on its papers.

Conclusion

[55] It follows therefore that the main application as well as the counter-application are liable to be struck from the roll in that in both instances, a case for urgency was not made out.

Order

[56] In the result, I hereby make the following order:

Ad main urgent application:

1. The point *in limine* of non-joinder of the Social Security Commission is dismissed.
2. The urgent application is struck for want of urgency.

Ad Urgent counter-application:

1. The urgent counter-application is struck for want of urgency.

Ad both applications:

1. The applicant must pay, in respect of the main urgent application, the costs of the third, fourth, sixth and fourteenth respondents. In respect of the third and fourth respondents, such costs shall include the costs of one

instructed and one instructing legal practitioner. In respect of the sixth and fourteenth respondents, the costs shall be for one legal practitioner.

2. In respect of the urgent counter-application, the sixteenth respondent must pay the costs of the third and fourth respondents, such costs to include the costs of one instructed and one instructing legal practitioner.
3. The matter is removed from the roll and regarded finalized.

H Angula
Deputy Judge-President

APPEARANCES:

APPLICANT: T MUHONGO
Instructed by Ndaitwah Legal Practitioner, Windhoek

1ST, 2ND, 3RD, 4TH
and 5TH RESPONDENTS: T CHIBWANA
Instructed by Office of the Government Attorney,
Windhoek

6TH and 14TH
RESPONDENTS: B TJATJARA
Of Bernhard Tjatjara & Co. Inc., Rundu

15TH RESPONDENT: No appearance
Of Tjitemisa & Associates, Windhoek

16TH RESPONDENT: J JACOBS
Instructed by Koep & Partners, Windhoek

38TH and 59TH
RESPONDENTS: No appearance
Instructed by Jerhome Tjizo & Co. Inc., Windhoek