

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00364

In the matter between:

MINISTER OF EDUCATION, ARTS AND CULTURE

APPLICANT

and

THE REVIEW PANEL

1st RESPONDENT

HARITAGE CATERERS (PTY) LTD

2nd RESPONDENT

FREE NAMIBIA CATERERS CC

3rd RESPONDENT

OKG FOOD SERVICES (PTY) LTD

4th RESPONDENT

KUNENE CATERERS (PTY) LTD

5th RESPONDENT

EYAMBEKO NAMIBIA CATERING SERVICES

6th RESPONDENT

ATLANTIC FOOD SERVICES (PTY) LTD

7th RESPONDENT

ATLANTIC CATERING SOLUTIONS (PTY) LTD

8th RESPONDENT

TSEPO CATERING (PTY) LTD

9th RESPONDENT

MINISTER OF FINANCE

10th RESPONDENT

Neutral citation: *Minister of Education, Arts and Culture v The Review Panel* (HC-MD-CIV-MOT-GEN-2022/00364) [2022] NAHCMD 466 (8 September 2022)

Coram: USIKU, J

Heard: 17 August 2022

Delivered: 8 September 2022

Flynote: Practice – Applications and Motions – Urgent Application – Interim relief – Procurement Act 15 of 2015.

Summary: The applicant approached the court on urgent basis seeking an interim interdict pending the consideration and determination of an application for the review and setting aside of a decision made by the Review Panel. The Review Panel had ordered a suspension of an award of a tender for catering services to government school hostels and directed the applicant to re-evaluate the process. The second respondent whom the Review Panel found was in many instances the lowest bidder and should have been nominated as a successful bidder, opposes the application.

Held that the applicant has met the requirements for urgency and interim interdict and is entitled to the relief sought.

ORDER

1. The applicant's non-compliance with the rules of court relating to forms and service is hereby condoned and this matter is heard as one of urgency as contemplated in terms of rule 73 of the Rules of the High Court.
2. The decision taken by the first respondent on 26 July 2022 and communicated to the applicant on 4 August 2022 is hereby stayed pending the finalization of the applicant's review application under Part B of this application.
3. The order made under paragraph 2 above serves as an interim interdict with immediate effect pending the finalization of Part B of the applicant's application.
4. Each party is ordered to bear its own costs in respect of Part A of the application.
5. Part A of the application is removed from the roll and regarded finalized.
6. Part B of the application is postponed to 5 October 2022 at 15h15 for case management conference.
7. The parties are directed to file a joint case management report on or before 28 September 2022.

JUDGMENT

USIKU J

Introduction

[1] This is an urgent application launched by the Minister of Education, Arts and Culture (“the Minister”), seeking an interim relief to stay the operation and execution of a decision made by the Review Panel on 26 July 2022, pending the finalization of a review application contained in Part B of the application.

[2] The application consists of two parts, namely Part A and Part B. Part A is the urgent part, in which the applicant seeks an interim relief, pending the finalization of Part B. In Part B, the applicant seeks the review and setting aside of the decision made by the Review Panel (the first respondent) on 26 July 2022. Part B is to be prosecuted in the normal course.

[3] At the moment the court is called upon to only decide the issues raised under Part A.

Background

[4] On or about 30 June 2022, the Minister issued out a request to certain service providers, with whom the Minister had previous business relationship, for quotations through emergency procurement of services to supply foodstuffs to government school hostels, for the period of 17 July 2022 to 31 December 2022. The closing date for the submissions of quotations was 5 July 2022.

[5] Eight quotations were received from eight bidders and on 8 July 2022, the Ministry of Education, Arts and Culture (“the Ministry”) awarded procurement contracts to five successful bidders. The remaining three bidders were unsuccessful.

[6] On 11 July 2022, Haritage Caterers (Pty) Ltd (“Haritage”), being one of the unsuccessful bidders, received a document titled “executive summary” representing the summary of the evaluation of the quotations submitted by various bidders.

[7] On 13 July 2022, Haritage filed a review application with the Review Panel seeking:

- (a) urgent interdictory relief for the suspension of the award by the Ministry, pending the outcome of the review application before the Review Panel and,
- (b) the review and setting aside of the decision of the Minister in respect of the awards made on 8 July 2022.

[8] The Review Panel heard the matter on 26 July 2022 and communicated its decision on 4 August 2022. In its decision the Review Panel upheld Haritage’s application and suspended the award. The Review Panel further directed the Ministry to re-evaluate the process.

[9] On 9 August 2022, the Minister launched the present application. In Part A of the application the Minister seeks the following relief:

‘PART A:

1. Condoning the applicant’s non-compliance with the Rules of Court relating to service and time periods for exchanging of pleadings, and to hear the matter as one of urgency as contemplated in terms of Rule 73 of the Rules of the High Court.
2. Ordering that the decision taken by the first respondent on 26 July 2022 and communicated to the applicant on 4 August 2022 be stayed, pending the finalization of applicant’s review application under Part B of this application.
3. Ordering that the order sought under paragraph 2 serves as an interim interdict with immediate effect, pending the finalization of Part B of this application.
4. Costs of suit against any respondent who opposes this application.’

[10] In Part B of the application, the Minister seeks the following relief:

‘PART B:

An order calling upon the respondents to show cause why the following orders should not be made:

1. An order reviewing, correcting and setting aside the decision by the first respondent on or about 26 July 2022 and communicated to the applicant on 4 August 2022.
2. An order declaring that the first respondent's decision to suspend the awards was ultra vires the Procurement Act 15 of 2015, as invalid and of no force in law.
3. Costs of suit against any of the respondents that opposed this order.
4. Further and/or alternative relief.'

[11] Haritage opposes the application.

[12] Eyambeko Namibia Catering Services (Pty) Ltd, being one of the successful bidders (the sixth respondent), is not opposing the application. It proposes that the status quo be maintained, and made submissions during the hearing.

The application

[13] The Minister is not content with the decision made by the Review Panel on account that:

- (a) when the Review Panel communicated its decision on 4 August 2022, the procurement contracts were already in force and the successful bidders were already providing catering services to government school hostels with effect from 17 July 2022 and that,
- (b) the effect of the decision of the Review Panel is that the existing procurement contracts are terminated and the Ministry is directed to start afresh with the evaluation of the eight bidders.

[14] The Minister argues that the Review Panel made a decision that was beyond its powers in terms of s 60 of the Procurement Act, 15 of 2015 ("the Act"). In terms of s 60(c) the Review Panel may not set aside a decision bringing a procurement contract into force. According to the Minister, the Review Panel was informed during the hearing of the review application before it, that the procurement contracts were already in force and that the catering service-providers were already supplying foodstuffs to government school hostels as from 17 July 2022.

[15] It is further the contention of the Minister that, the Review Panel made findings that:

(a) the Ministry did not comply with the provisions of s 55(5) of the Act, and that,

(b) there was a use of a 5% margin, in the evaluation of bids, which was not disclosed to the bidders in the bidding documents. The Minister argues that, the foregoing points were not part of the grounds of review submitted by Haritage for the consideration of the Review Panel. She therefore contends that the Review Panel went beyond the ambit of the review application by considering additional grounds it raised itself. According to the Minister, Haritage merely complained, in its review application, that it was the lowest responsive bidder.

[16] The Minister therefore submits that, in view of the aforesaid process before the Review Panel, its decision is a nullity and liable to be reviewed and be set aside.

[17] The Minister proceeded to deal with the issues of urgency and requirements for interim interdict, and submitted that she is entitled to the relief as set out in Part A of the application.

The opposition

[18] Haritage contends that, should the Minister succeed with its interim relief, she will in fact be obtaining final relief, for the following reasons:

(a) the main review application would most likely be heard only in 2023. Thereafter, an appeal may be lodged by the unsuccessful party which will delay the final outcome by another year,

(b) the contracts awarded under the request for quotations would terminate on 31 December 2022. This will be prior to the hearing of the review application,

(c) the review application will on 31 December 2022, if on-going, become moot and judgment in such instance will be purely academic.

[19] Haritage, therefore, submits that the application be dismissed on the basis that the applicant, for all intents and purposes, seeks an urgent final relief.

[20] In addition, Haritage contends that the Minister did not comply with the provisions of s 55 (and regulation 38) of the Act, in that:

- (a) the unsuccessful bidders were not notified of the successful bidders,
- (b) the bidders were not notified of the seven days standstill period referred to in s 55(5) of the Act, during which a review application may be lodged and during which a contract may not be awarded,
- (c) the Minister ought not to have awarded the tender in the face of Haritage's review application made within that seven days standstill period.

[21] Haritage submits that the Minister's application is premised upon an illegal conduct and seeks to perpetuate such illegality.

[22] It is further the contention of Haritage that the Minister has not met the requirements of urgency and of the final interdict that she seeks, and that the application be dismissed with costs. Haritage proposes that the dismissal be coupled with the following rider:

- (a) the applicant be ordered to re-evaluate the quotations within three days of the date of this order and that,
- (b) the *status quo* be maintained, until the re-evaluation of the process as directed by the Review Panel is given effect to.

Analysis

[23] Urgent applications are governed by rule 73 which requires an applicant to 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.

[24] In the present matter the Minister avers that the suspension of the catering awards by the Review Panel renders the matter urgent. According to the Minister, if

the ruling of the Review Panel is not stayed on urgent basis the academic performance of hostel school children will be negatively impacted.

[25] According to the evidence on record, approximately 63 000 learners live in government school hostels.

[26] It appears apparent to me that the suspension of the catering awards imply virtual cessation of the catering services at government school hostels. The fact that the learners resident in the affected government school hostels may suffer inconvenience of such magnitude, if the urgent application is not granted, is in my opinion sufficient reason to treat the matter as urgent.

[27] The fact that the Ministry failed to follow the statutory procedures required for making awards, does not allay the adverse consequences that may befall the learners, who are not to blame for the Ministry's failure to follow the relevant statutory provisions.

[28] On the totality of the evidence adduced, I am persuaded that the present application is one of urgency and should be heard as such.

[29] As regards the issue of the interdict, the requirements for an interim interdict can be summarized as follows:

- (a) a *prima facie* right,
- (b) a well-grounded apprehension of irreparable harm, if the interim relief is not granted,
- (c) that the balance of convenience favours the granting of the interim interdict, and,
- (d) the lack of another satisfactory or adequate remedy in the circumstances.

[30] In the matter of *National Treasury and Others v Opposition to Urban Tolling Alliance*,¹ the requirement of a *prima facie* right was explained to mean that an applicant must establish not merely that he has a right to approach a court in order to

¹ *National Treasury and Others v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).

challenge a particular decision, but must also show that if not protected by an interdict, irreparable harm would ensue.

[31] In the present matter, the Minister avers that she has a right to continue with the existing contractual obligations, as the Act prohibits a challenge once a decision to enforce the contract has been made.

[32] On the facts of the present matter, I am persuaded that the disruption in the feeding programmes of the learners in government school hostels, would affect the concerned learners' right to education, and I consider that if such right is not protected by the interim interdict, irreparable harm would ensue. I am therefore, of the opinion that a *prima facie* right has been established in the present case.

[33] Insofar as the balance of convenience is concerned, I am of the opinion that the interest of the recipients of catering services (students) and the hardships they may experience, have to be weighed against the factors that favour refusal of the interim relief. Having considered factors such as the number of the learners involved who would be adversely affected and that they are not to blame for the Ministry's non-compliance with the statutory provisions and the absence of a satisfactory remedy, I am of the opinion that the balance of convenience favour the granting of the interim interdict.

[34] I have considered the submission by the second respondent to the effect that the granting of the interim relief will or may have the effect of a final relief. That submission could be correct. However, that fact alone, does not warrant the dismissal of the present application. It only illuminates the difficulty presented when an administrative act in respect of which review proceedings are initiated, has already been acted upon by the time when the review is brought. The potential for further reviews following any new determination, in such circumstances, is endless, and thus likely to render the status quo appear permanent.

[35] I am of the opinion that the facts of the present case, as outlined above, do not justify the dismissal of the application for interim relief, as the second respondent proposes. The application for interim relief therefore stands to be granted.

[36] As regards the issues of costs, it is trite that the determination of costs is a discretionary matter based on the facts of each case.

[37] In the present matter, Haritage has a ruling made in its favour by the Review Panel. Haritage was entitled to protect its right arising from the decision of the Review Panel. In my opinion the opposition mounted by Haritage in this application was not made in bad faith.

[38] Similarly, the Minister acts in the public interest, to protect the interests of the recipients of existing catering services. Often when a public entity fails to deliver, it is the poor that are adversely affected.

[39] Having had regard to the foregoing considerations, I am inclined to order that each party bears own costs in the present application. I shall therefore make an order to that effect.

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

1. The applicant's non-compliance with the rules of court relating to forms and service is hereby condoned and this matter is heard as one of urgency as contemplated in terms of rule 73 of the Rules of the High Court.
2. The decision taken by the first respondent on 26 July 2022 and communicated to the applicant on 4 August 2022 is hereby stayed pending the finalization of the applicant's review application under Part B of this application.
3. The order made under paragraph 2 above serves as an interim interdict with immediate effect pending the finalization of Part B of the applicant's application.
4. Each party is ordered to bear its own costs in respect of Part A of the application.
5. Part A of the application is removed from the roll and regarded finalized.
6. Part B of the application is postponed to 5 October 2022 at 15:00 for case management conference.

7. The parties are directed to file a joint case management report on or before 28 September 2022.

B USIKU
Judge

APPEARANCES:

APPLICANT: F Kadhila
Of the Office of the Government Attorney, Windhoek

SECOND RESPONDENT: G Totemeyer (SC) (with him G Dicks)
Instructed by Ellis & Partners Legal Practitioners,
Windhoek

SIXTH RESPONDENT: R Heathcote (SC) (with him Jacobs)
Instructed by Koep & Partners, Windhoek