

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING**

Case no.: HC-MD-CIV-MOT-REV-2023/00301

In the matter between:

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

FIRST APPLICANT

THE CENTRAL PROCUREMENT BOARD OF NAMIBIA

SECOND APPLICANT

and

THE CHAIRPERSON OF THE REVIEW PANEL

FIRST RESPONDENT

THE REVIEW PANEL

SECOND RESPONDENT

ROADS AUTHORITY

THIRD RESPONDENT

LUKA ROADS RAILS & CIVILS CC

FOURTH RESPONDENT

NDAKALIMWE INVESTMENT CC

FIFTH RESPONDENT

JAMES & YOUNG TRADING ENTERPRISES CC

SIXTH RESPONDENT

QUIVER TREE INVESTMENTS (PTY) LTD

SEVENTH RESPONDENT

JOHN NAMUSHESHE CONSTRUCTION

& INVESTMENT CC

EIGHTH RESPONDENT

PALLADIUM CIVIL ENGINEERING (PTY) LTD

NINETH RESPONDENT

MOZA INVESTMENT CC

TENTH RESPONDENT

COLOSSEUM INVESTMENTS

ELEVENTH RESPONDENT

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|---|---------------------------|
| BAOBAB TRADING ENTERPRISES CC | TWELFTH RESPONDENT |
| SHATTY CONSTRUCTION CC | THIRTEENTH RESPONDENT |
| OSHIKOTO BUILDING CONSTRUCTION | FOURTEENTH RESPONDENT |
| DANNY'S CONSTRUCTION CC | FIFTEENTH RESPONDENT |
| SASH TRADING & EARTYH WORKS | SIXTEENTH RESPONDENT |
| QUEEN MWETAKO INVESTMENT CC | SEVENTEENTH RESPONDENT |
| ETN TECHNICAL SERVICES CC | EIGHTEENTH RESPONDENT |
| BRANBERG CONSTRUCTION CC | NINETEENTH RESPONDENT |
| CSV SHAANIKA CONSTRUCTION (PTY) LTD | TWENTIETH RESPONDENT |
| GLOBEX INVESTMENT CC | TWENTY-FIRST RESPONDENT |
| OCTAGON CONSTRUCTION (PTY) LTD | TWENTY-SECOND RESPONDENT |
| EARTH ETHIX CONSTRUCTION CC | TWENTY-THIRD RESPONDENT |
| OTESA CIVIL ENGINEERING (PTY) LTD | TWENTY-FOURTH RESPONDENT |
| BORTHMA ROAD CONSTRUCTORS & PLANT HIRE | TWENTY-FIFTH RESPONDENT |
| NGC INVESTMENT CC | TWENTY-SIXTH RESPONDENT |
| HBHJE INVESTMENT CC | TWENTY-SEVENTH RESPONDENT |
| EMIRATES TRADING CC | TWENTY-EIGHTH RESPONDENT |
| KETTU TRADING ENTERPRISES CC | TWENTY-NINETH RESPONDENT |
| VAAALGRAS CONSTRUCTION CC | THIRTIETH RESPONDENT |
| ODJOVE TRADING & CONSTRUCTION | THIRTY-FIRST RESPONDENT |
| NAMIBIA WELDING BUILDING & CIVIL | THIRTY-SECOND RESPONDENT |

Neutral citation: *The Chairperson of the Central Procurement Board of Namibia v The Chairperson of the Review Panel* (HC-MD-CIV-MOT-REV-2023/00301) [2023] NAHCMD 451 (28 July 2023)

Coram: SIBEYA J
Heard: 21 July 2023
Delivered: 28 July 2023

Flynote: Applications – Urgent application – Rule 73 – Public Procurement Act 15 of 2015 – Decisions taken by the Review Panel must be complied with and implemented, unless such decisions are set aside – Applicants failed to establish the urgency of the matter

Summary: This application was brought to court on an urgent basis. In July 2022, the Central Procurement Board of Namibia (CPBN) issued out an invitation for bids on behalf of the Roads Authority for development contracts for blading gravel roads in the Keetmanshoop area under procurement number: W/OAB/CPBN-08/2022. At around the same time, similar invitations for bids were sent out for the Oshakati and Otjiwarongo areas. The bid for similar services in Windhoek was at that point already awarded.

After evaluation of the bids, both the five successful and twenty-nine unsuccessful bidders were notified through the notice of selection of the award of 20 April 2023. The CPBN informed the eighth respondent that its bid failed as it was already awarded two procurement contracts for similar services in the area of Windhoek. A third award of the contract was prohibited as one of the selection and evaluation criteria provided that a bidder may only be awarded a maximum of two procurement contracts.

The respondent approached the Review Panel challenging the award of the CPBN. Amongst the grounds on which the decision of the CPBN was impugned was the alleged uncertainty, unfairness and uncompetitive nature of the evaluation criteria introduced by the CPBN in clause 1.2 v, which restricted the number of contracts to be awarded to a development contractor to one per region and two across the four Roads Authority maintenance regions. The application by the respondent was opposed by the CPBN.

On 14 June 2023, the Review Panel made a decision to change the names of the successful bidders so as to include the eighth respondent, which the CPBN was to implement within a thirty days from 1 June 2023. The decision was not complied with and as such the CPBN lodged this application.

Held: that the applicants are duty-bound to comply and implement the decision of the Review Panel unless such decision is set aside according to law.

Held that: while being well aware that they had a duty to comply with the order of the Review Panel, which they failed to execute within the stipulated period, the applicants sought no condonation for such default.

Held further that: the court caution that where a party is in default of an order related to the relief that it seeks from the court, such party must first seek condonation for the default before or together with the relief sought.

Held: the applicants, in their quest to prove urgency, failed to establish the status of the pending bids for similar services which they claim may be impacted by the present decision of the Review Panel if the matter is not heard on urgency, and further failed to establish how the said decision may affect future related bids.

The application is struck from the roll for lack of urgency.

ORDER

1. The first and second applicants' non-compliance with the Rules of this Court pertaining to time periods for service of the application, giving notice to parties and exchange of pleadings as contemplated in rule 73 of the Rules of this Court is refused and the application is struck from the roll for lack of urgency.
2. The first and second applicants must, jointly and severally, the one paying the other to be absolved, pay the eighth respondent's costs of opposing the application, such costs to include costs of one instructing and one instructed costs legal practitioner.

RULING

SIBEYA J:

Introduction

[1] Serving before court is an application brought on urgency by the applicants. The applicants seek an order to review and set aside, alternatively, to stay the execution of the order of the second respondent to set aside the award made by the second applicant. The applicants further seek declaratory relief that the impugned decision of the second respondent be declared null and void and of no legal consequence.

[2] The application is opposed by the eighth respondent only.

Parties and legal representation

[3] The first applicant is the Chairperson of the Central Procurement Board of Namibia (CPBN), an adult person duly appointed in terms of s 11(2) of the Public Procurement Act No 15 of 2015, 'the Act'.

[4] The second applicant is the Central Procurement Board of Namibia (CPBN), duly established in terms of s 8 of the Act, with offices situated at Mandume Park 1, Teinert Street, Windhoek.

[5] The first respondent is the Chairperson of the Review Panel, an adult person duly appointed in terms of s 58(2) of the Act.

[6] The second respondent is the Review Panel, a body duly established in terms of s 58 of the Act, with offices situated at the Ministry of Finance, Moltke Street, Windhoek.

[7] The third respondent is the Roads Authority, a body established in terms of s 2 of the Roads Authority Act No 17 of 1999, with offices situated in Mandume Ndemufayo Avenue, Windhoek.

[8] The fourth to the thirty-second respondents are close corporations or companies registered or incorporated in terms of the Close Corporation or company laws of the Republic, that submitted bids for the tender for blading roads in the Keetmanshoop area under procurement reference number: W/OAB/CPBN-08/2022.

[9] As stated hereinabove, only the eighth respondent opposed the application, therefore, I shall refer to the eighth respondent as 'the respondent'.

[10] The applicants are represented by Ms Ihalwa while the respondent is represented by Mr Halweendo.

Relief

[11] The applicants seek the following orders:

'1 An order in terms whereof the applicants' non-compliance with Rule 73(1), (3) and (4) (of the Rules) 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 applicants' service of this application in a manner other than (that) contemplated in Rule 8 of the Rules of this Court is condoned.

3. An order in terms whereof, pending the final adjudication and determination of this application, 1st, 2nd and 3rd respondents are restrained and interdicted from implementing (including the awarding and conclusion of contracts) the first and second respondents' decision dated 14 June 2023.

4. An order in terms whereof pending the final adjudication and determination of this application, the 4th, 5th, 6th, 7th and 8th respondents are restrained and interdicted from executing work under procurement reference number: W/OAB/CPBN-08/2022.

5. An order in terms whereof the first and second respondents' decision of 14 June 2023, is reviewed and set aside.

6. An order in terms whereof the first and second respondents' decision of 14 June 2023, is declared null and void of any legal consequences.

7. An order in terms whereof the decision of the applicant(s) dated 20 April 2023 – The notice for selection of Procurement Award under procurement reference number: W/OAB/CPBN-08/2022 is confirmed.

8. An order in terms whereof the respondents electing to oppose this application are ordered to pay the applicants' costs, being the costs of one instructing and one instructed legal practitioner.'

Background

[12] In July 2022, the CPBN issued out an invitation for bids on behalf of the Roads Authority for development contracts for blading gravel roads in the Keetmanshoop area under procurement number: W/OAB/CPBN-08/2022. At around the same time, similar invitations for bids were sent out for the Oshakati and Otjiwarongo areas. The bid for similar services in Windhoek was already awarded.

[13] After evaluation of the bids, both the five successful and twenty-nine unsuccessful bidders were notified through the notice of selection of the award of 20 April 2023. Amongst the unsuccessful bidders was the respondent. The CPBN informed the respondent that its bid failed as it was already awarded two procurement contracts for similar services in the area of Windhoek. A third award of the contract was prohibited as one of the selection and evaluation criteria provided that a bidder may only be awarded a maximum of two procurement contracts.

[14] Discontented by the selection award, the respondent applied to the Review Panel challenging the award of the CPBN. Amongst the grounds on which the decision of the CPBN was impugned was that the alleged uncertainty, unfairness and uncompetitive nature of the evaluation criteria introduced by the CPBN in clause 1.2 v, which restricted the number of contracts to be awarded to a development contractor to one per region and two across the four Roads Authority maintenance regions. The application by the respondent was opposed by the CPBN.

[15] On 14 June 2023, the Review Panel delivered its decision and ordered:

(a) That s 28(2) of the Act, in terms whereof the bid was issued referring to conferring an advantage to or preference to Namibian goods, services, suppliers or persons in the empowerment categories and the Review Panel found that s 28(2) finds no application to this bid.

(b) That the respondent is included in the list of successful bidders to the exclusion of Namibia Welding Building & Civil (the thirty-second respondent) which was initially included in the list of the successful bidders.

(c) That the effective date of the order is 1 June 2023, and the order shall be implemented within 30 days of the date of the order.

[16] It is this decision of the Review Panel that the applicants seek to have reviewed and set aside for lack of a legal basis for the decision.

Urgency

[17] The respondent raised a point *in limine* that the application lacks urgency and should, on that basis, be struck from the roll. In the written heads of argument for the respondent prepared by Ms Chinsembu, she stated that the applicants claimed the urgency of the matter on the basis that there are other bids with a similar criterion which

are affected by the decision of the Review Panel. Ms Chinsembu then proceeded to state that the applicants failed to state whether the said similar bids were advertised, the date when such bids were due, the dates when the procurement contracts were due to be signed and the date for the commencement of rendering services. On this basis, Ms Chinsembu argued that the applicants failed to establish the urgency of the matter and it fell to be struck from the roll.

[18] Mr Halweendo, in oral arguments, submitted that the basis of the review application is of great significance to procurement that requires adequate consideration and adjudication, and should not be rushed in an urgent application. He argued further that the decision of the Review Panel was based on the averments made in the respondent's founding affidavit submitted before it. He argued that the review Panel is empowered by s 60(d) of the Act to correct of the CPBN if it is found not to be in compliance with the Act. Mr Halweendo argued that the Review Panel found the award made by the CPBN not to be in compliance with the Act and corrected the award by including the respondent who tendered the lowest responsive bid. No illegality is being perpetuated to warrant the matter to be heard on urgency, so he argued.

[19] Mr Halweendo further argued that no basis was laid by the applicants to establish their allegation that the impugned decision of the Review Panel affects other bids which are ongoing and not yet awarded. He concluded that the applicants failed to establish urgency and their application should be struck from the roll with costs.

[20] Ms Ihalwa argued contrariwise. She argued that the applicants instituted this application without delay on 11 July 2023 after becoming aware of the decision of the Review Panel on 15 June 2023. She argued that the Review Panel has no authority to award a bid, which is what it did when it included the respondent in the bidders selected for the award. She argued that this decision constitutes an illegality which needs to be rectified as a matter of urgency. Ms Ihalwa argued further that the Review Panel's reference to s 28(2) of the Act, as the provision on which clause 1.2 v was premised is

misplaced and plainly wrong, requiring urgent correction. This is due to the fact that clause 1.2 v has no relation to s 28(2) and was not intended to relate to s 28(2).

[21] Ms Ihalwa further argued that clause 1.2 v is part of other developmental projects which are still pending and the Review Panel's impugned decision affects the evaluation of such decision, hence the need to set aside or rectify the said decision as a matter of urgency. In response to a question put to her by the court as to what is the main qualm that the applicants have in this matter, Ms Ihalwa stated that it was the fact that the striking out or setting aside of clause 1.2 v of the bid documents affects other pending similar bids and, therefore, the applicants would not be able to award the said similar bids.

[22] Ms Ihalwa further argued that the application could not be instituted in the ordinary cause, as the execution of the procurement process, after the decision of the Review Panel, is about to commence. She argued that the said commencement of the execution would imperil the applicants' rights to make the selection of the awards in terms of the Act.

Analysis

[23] For the application to be heard on urgency, the applicant must satisfy rule 73(4) of the rules of this court. I proceed to consider whether or not the applicants met the requirements set out in rule 73(4). 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.'

[24] This court, in *Nkinda v The Municipal Council of the Municipality of Windhoek*,¹ considered the impact of urgent applications on the orderly administration of justice and remarked as follows at para 10 – 11:

[10] Urgent applications are not a given as they interfere with the normal orderly arrangement of court rolls and get prioritized over already scheduled matters. It was accentuated in *Luna Meubel Vervaardigers v Makin and Another*² that:

“Urgency involved mainly the abridgement of times prescribed by the rules and secondarily, the departure from established filing and sitting times of court.”

[11] Urgent applications therefore enjoy an unfair advantage which requires closer scrutiny by the court for the application to be sanctioned as one of urgency and to be accorded precedence over other cases.’

[25] In *casu*, the decision of the Review Panel of 14 June 2023, complained about, was received by the applicants on 15 June 2023. The said decision states clearly that it is effective from 1 June 2023 and should be implemented within 30 days and the CPBN should provide proof of such implementation. This means that the applicants were aware, at least by 15 June 2023, that the decision of the Review Panel was due to be implemented on or before 1 July 2023. The applicants failed to comply with the order of the Review Panel, as by the time that they launched this application on 11 July 2023, they have not implemented the decision of the Review Panel. As a matter of fact the decision of the Review Panel was yet to be implemented by the CPBN by the date of hearing arguments in this matter on 21 June 2023.

[26] It should be stated that the applicants are duty bound to comply and implement the decision of the Review Panel, unless such decision is set side according to law. While being well aware that they had a duty to comply with the order of the Review Panel which they failed to comply with, within the stipulated period, the applicants are in

¹ *Nkinda v The Municipal Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-GEN-2019/00400) [2019] NAHCMD 446 (31 October 2023).

² *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) 136H.

default and seek no condonation for such default. As a matter of fact, their founding papers are silent on the said default, as if it can be wished away. On this basis alone, the application could fail on urgency. I sound a word of caution that where a party is in default of an order related to the relief that it seeks from the court, such party must first seek condonation for the default before or together with the relief sought.

[27] It appears from the applicants' founding papers that the position taken by the Review Panel regarding clause 1.2 v of the bid, in their view renders this matter urgent as it has an impact on other related bids. The applicants, however, failed to establish the status of such other related bids and the stage where they are at. In any event, on this issue, Ms Ihalwa conceded to a question from the court that the decision taken by the Review Panel in this matter has no binding effect on other bids as each bid is evaluated on its own fact and merits. This concession, in my view, was correctly made. Nothing prevents the Review Panel to revisit clause 1.2 v in another bid that is brought to its attention for determination. The complaint, therefore, that other pending bids are affected by the present decision of the Review Panel, hence justifying the urgency of the application, lacks merit.

[28] At the tail end of the hearing of oral arguments, it became apparent when a question was posed to Ms Ihalwa whether the main issue in this matter is the Review Panel's decision regarding clause 1.2 v of the bid, which she affirmed. As alluded to above, the decision of the Review Panel regarding clause 1.2 v may be revisited in other bids. Ms Ihalwa argued that clause 1.2 v has nothing to do with s 28(2) of the Act which provides that:

'(2) Subject to this Act, a public entity may confer an advantage or preference to Namibian goods, services, suppliers or persons in the empowerment categories in the case of open advertised bidding process.'

[29] Ms Ihalwa argued that clause 1.2 v makes not reference to s 28(2) and all entities that submitted their bids were Namibian entities, therefore, making the said

section inapplicable. Without finally deciding the matter, I prima facie find that the Review Panel concluded, over and above making reference to s 28(2), that all the awarded procurement contracts are separate procurement processes, which cannot be affected by a running bid; that the procuring agent failed to consistently apply clause 1.2 v. Whether the Review Panel was right or wrong in its application of s 28(2) to this matter is not for decision at this stage. I say so because, before the review application is heard the applicants must first pass the hurdle of urgency.

[30] It matters not that the applicants bundled their relief together in their notice of motion, including the review relief which they sought on urgency. The bottom line is still intact that before the review is considered the applicants must prove the urgency of the application. I pause to mention that clause 1.2v may be of great significance to procurement processes and may affect the business community and the public at large. Its validity or otherwise, in my view, cannot be determined in the present proceedings brought on urgency without sufficient materials including the review record and abridged times applicable to the period for filing papers and hearing and determination of urgent applications. I hold the view that this is a matter that can be brought and heard in the ordinary cause.

Conclusion

[31] In view of the foregoing findings and conclusions, this court is of the view that the applicants failed to explicitly set out the circumstances regarding urgency. The applicants, therefore, failed to prove that this matter should be heard as one of urgency. As a result, this court declines to exercise its discretion to hear this matter on urgency.

Costs

[32] It is an established principle of law that costs follow the result and this matter, in my view, enjoys no exception. The respondent will, therefore, be awarded costs, including costs of one instructing and one instructed legal practitioner.

Order

[33] In view of the above, it is ordered that:

1. The first and second applicants' non-compliance with the Rules of this Court pertaining to time periods for service of the application, giving notice to parties and exchange of pleadings as contemplated in rule 73 of the Rules of this Court is refused and the application is struck from the roll for lack of urgency.
2. The first and second applicants must, jointly and severally, the one paying the other to be absolved, pay the eighth respondent's costs of opposing the application, such costs to include costs of one instructing and one instructed costs legal practitioner.

O S Sibeya
Judge

APPEARANCES

APPLICANTS:

L Ihalwa

Instructed by the Office of the Government Attorney,
Windhoek

EIGHTH RESPONDENT:

N Halweendo

Instructed by Henry Shimutwikeni & Co, Windhoek