



***SPECIAL INTEREST***

CASE NO.: A 352/2010

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**SHETU TRADING CC**

**APPLICANT**

and

<b>THE CHAIR OF THE TENDER BOARD FOR NAMIBIA</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>THE MINISTER OF WORKS AND TRANSPORT</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>VAE PERWAY (PTY) LTD t/a VAE SA</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>GEORGE SIMATTA, PERMANENT SECRETARY</b>	
<b>MINISTRY OF WORKS AND TRANSPORT</b>	<b>4<sup>TH</sup> RESPONDENT</b>

**CORAM: HEATHCOTE, A.J**

**Heard on: 14 JUNE 2011**

**Delivered on: 22 JUNE 2011**

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**JUDGMENT**

**HEATHCOTE, A.J:**

[1] On 14 June 2011, the applicant sought an interim interdict on an urgent basis, to prevent the respondents from taking any further steps, including effecting delivery by third respondent to second respondent of the second consignment of rails which were due to arrive in Walvis Bay by ship on 20 June 2011, (in the execution of tender No F1/10/1-22/2010 Northern Railway Extension Project, Rail Procurement). *In limine*, first to fourth respondents raised the issue of urgency and res judicata.

[2] After having heard argument I ruled that I would hear the matter as one of urgency and I also dismissed the res judicata point.

[3] Immediately after I made the ruling for the matter to proceed on an urgent basis, the first to fourth respondents applied for leave to appeal to the Supreme Court against my ruling in respect of urgency.

[4] I dismissed the application for leave to appeal, and continued to hear the matter on an urgent basis. I reserved judgment and after having considered the matter, I dismissed the application for interim relief.

[5] I now provide my reasons:

## **URGENCY**

[6] There are probably more judgments emanating from this court, dealing with the provisions of Rule 6(12) – urgency – than any other legal rule I know of – whether procedural or substantive law.

[7] Most authoritatively, the full bench in *Mweb vs Telekom*<sup>1</sup>, said the following about urgent applications:

*“Rule 6 (12) (b) makes it clear that the applicant must in his founding affidavit explicitly set out the circumstances upon which he or she relies that it is an urgent matter. Furthermore, the applicant has to provide reasons why he or she claims that he or she could not be afforded substantial address at the hearing in due course. “*

*It has often been said in previous judgments of our Courts that failure to provide reasons may be fatal to the application and that "mere lip service" is not enough. (Luna Meubel Venuaardigers v Makin & Another (tf a MakinJs Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F; Salt & Another v Smith 1991 (2) SA 186 (NHC) at 187D-G.)*

*The fact that irreparable damages may be suffered is not enough to make out a case of urgency. Although it may be a ground for an interdict, it does not make the application urgent. (I L & B Markow Caterers (Pty) Limited v Greatermans SA Limitec;i & Another; Aroma Pty Limited v Hypermarket (Pty) Limited & Another 1981 (4) SA 108 (C) at 113E-114B.)*

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<sup>1</sup>*Mweb Namibia v Telecom Namibia Ltd Case No (P) A 91/2007 unreported*

*An applicant has to show good cause why the times provided for in Rule 6 (5) should not be abridged and why the applicant cannot be afforded substantial redress at the hearing in due course. (I L & B Markow Caterers (Pty) Limited v Greatermans SA Limited & Another supra, page 110H - 211A).*

*In Twentieth Century Fox Films Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (WLD) at 586 G, Goldstone, J had to deal with what has been described as "commercial interest" where there is no threat of life or liberty. The learned judge said that commercial interest may justify the implementation of Rule 6 (12) no less than any other interest, but that each case must depend on its own circumstances. For the purpose of deciding urgency, the court's approach is that it must be accepted that the applicant's case is a good one and that the respondent was unlawfully infringing the applicant's rights. (See also Bandle Investments (Pty) Ltd v Registrar of Deeds and Others 2001 (2) SA 203 (SE) at 213 A-F). The other side of the coin is that because the matter is one of a commercial nature it does not entitle the applicant to have his matter treated on an urgent basis. (Prest- Law & Practice of Interdicts, page 261).*

*In this Court in the case of Bergmann v Commercial Bank of Namibia Limited 2001 NR 48 (He) at 49H -50A), Martitz, J approved what was said in the cases Twentieth Century Fox Films Cooperation, supra, and Sweizer Reynecke Vleis Maatskapy (Edms) Bpk v Minister Landbou & Andere 1971 (1) PH FII, namely that: "when the applicant) who is seeking the indulgence, has created the emergency, either mala fides or through her culpable remissness or inaction J1" he cannot succeed on the basis of urgency.*

*An applicant should not delay in approaching the Court and wait until a certain event is imminent and then rely on urgency to have his / or her matter heard.*

*"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. .) (Bergmann v Commercial Bank of Namibia Limited, supra, at 50G - I. Prest, supra, at 260)*

*"When an applicant believes that his matter is one of urgency he may decide himself what times to allow affected parties for entering appearance to defend and for answering affidavitsJ'. (I L & B Markow Caterers (Pty) Limited v Greatermans SA Limited & Another, supra, page 11DE).*

*The convenience of the Court is also a consideration that should not be ignored.*

*In Makhuva & Others v Lukoto Bus Service (Pty) Ltd & Others 1987 (3) SA 376 (VSC) the learned judge said the following on p 391H:*

*"I feel that the convenience of the Court is a matter that must be considered when urgent applications are thrust -upon the roll and for this additional reason I also find that there was no urgency proven and that the application should be struck from the roll.*

*The 'convenience of court' is not an optional extra that can at will be sacrificed at the altar of the parties' convenience. It is a very important consideration at all times and practitioners in making arrangements with each other on the conduct of a case should always have that at the back of their minds."*

[8] The principles enunciated in Mweb are clear. However, each and everyone of those principles do not find application in each and every case. It admits of no doubt that it falls within the discretion of the judge to condone

non-compliance with the rules or not. In exercising that discretion, all or any of the principles enunciated in Mweb may find application; depending on the facts of the case. In turn, the principles explained in Mweb are not all encompassing. Exercising a discretion judicially;

*“is by no means the same as general intuition” as “a judge who decides merely as he thinks fit without reference to existing legal rule, is to be feared more than dogs and snakes ... the discretion may not be exercised according to the “whim of the judges own brain”.<sup>2</sup>*

[9] In this case, as in so many others, counsel for the respondents have diligently determined the first day, which according to them, the applicant could have approached the court on an urgent basis. Then they calculated each and every day, as from the date which they submit, an urgent application could have been lodged. According to these calculations, they then submitted that, indeed, many days have passed and therefore the urgency is self created. This approach was referred to during argument as the “delay rule”. I must say immediately, there is no such a thing as a “delay rule” in our law as far as urgency is concerned. What Martiz, J: (as he then was) held in Bergmann<sup>3</sup>, was that the court, in the exercise of its discretion, may refuse to hear the matter on an urgent basis if the applicant delayed in a “*mala fides*” manner or when there was “*culpable remissness or inaction*”. In

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<sup>2</sup> Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd 2010(2) NR 703 at 718 C-D

<sup>3</sup>Bergmann v Commercial Bank of Namibia Limited 2001 NR 48

my view, the words “*culpable remissness or inaction*” cannot be interpreted like a statute. Simple inaction (which appears to have given birth to the so called delay –rule and the diligent calculation of days) cannot by itself be a basis for exercising a discretion against an applicant. I read what Maritz; J, has said to mean “*culpable remissness or culpable inaction*”. Any other meaning would unduly limit the exercise of the court’s discretion.

[10] A realistic approach, in my view, was followed by Smuts; J, when he said the following in Wall – Mart Stores Incorporated v The Chairperson of the Namibian Competition Commission and Others (Case No. A 61/2011).

*“Implicit in Mr Botes’ argument is that there would not be urgency in commercial matters of this nature, and that they should be heard in the ordinary course. This is not correct. This court has on numerous occasions held that commercial urgency also justifies the use of urgent procedures in following well known South African authority to that effect:*

*In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6(12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed, as I have to do, that the applicants’ case was a good one...*

[11] Moreover in Petroneft International and Others v The Minister of Mines and Energy and Others Case No A 24/2001, Smuts, J, said the following at 25 – 34:

It is clear to me that the statutory and contractual context and commercial setting of the application would need to be thoroughly considered prior to launching the application. This is quite apart from the magnitude of the matter and its importance to the various parties. This process would clearly entail thorough and detailed preparation, preceded by research and consultation. These aspects are undoubtedly highly relevant to the exercise of my discretion whether or not to condone the non-compliance with the Rules of Court and hear the matter as one of urgency.

In exercising this discretion, it is firstly important to note that there are varying degrees of urgency as was stated in Luna Meubel Vervaardigers (Edms) Bpk v Makin and another 1977(4) SA 135 (W) which has been cited with approval by this Court and its constitutional predecessor. This is also recognized in the Bergmann matter, where it is stressed that Rule 6(12) allows a deviation from the prescribed procedures in urgent applications and that, as far as practicable, parties and practitioners should give effect to the objective of procedural fairness when determining the procedure to be followed in such instances to afford a respondent with reasonable time to oppose the application.

Mr Namandje argued however that commercial issues would not give rise to urgency. But this is not the case. This Court has frequently recognized that form of urgency in following Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd that the protection of a commercial interest can also justify urgent relief under Rule 6(12). "The urgency of commercial interest, as in casu, may justify the application of rule 6(12) no less than other interest and, for purposes of deciding upon urgency, I must assume that the applicant's case is a good one and that it has a right to the relief which it seeks."



The above quoted portion in the Twentieth Century Fox - matter is stated after counsel submitted, as Mr Namandje did in these proceedings, that there was no urgency in the absence of some threat to life or liberty and that only commercial urgency was raised in that matter Goldstone, J (as he then was) swept that approach aside in the previous passage and added in that matter that: "However, due allowance must clearly be made in the case of a foreign company, or foreign companies, and more especially in a case such as the present, where the applicants have international interests which must receive attention from its executives".

In commercial matters there would thus be degrees of urgency and it would be incumbent upon applicants to demonstrate with reference to the facts of a specific matter that they are unable to receive redress in the normal course and that the facts justify the urgency with which the application has been brought. They must not however have created their own urgency and would need to have afforded the respondents a sufficient opportunity to deal with the matter raised. It would be a question of fact to be determined in each case.

Whilst it is clear in this matter that the respondents were afforded a short period of time to provide answering papers, they have not sought any 41982 (3) SA 582 (W) at 586 G Approved in Bandle Investments (Pty) Ltd v Registrar of Deeds and Other 2001 (2) SA 203 (SE) at 213 E-F 13 postponement and have in fact answered to both the interim and final relief sought. The Minister does however point out that the respondents are "massively prejudiced" by the short time periods. He points out that certain officials were not available at the time. The Minister furthermore does not in his affidavit point out what further factual matter, relevant to the determination of the issues would need to be placed before Court. Nor was Mr Namandje able to do so in argument, particularly with regard to the legality of the revocation of the mandate on

the issues I have already referred to. The parties were both able to file heads of argument and presented detailed and thorough argument.

Mr Namandje also pointed out in argument that the respondents had not been able to file the record in terms of Rule 53. This would ordinarily be a right for the applicants to pursue which they have indicated they would decline to exercise. Furthermore the applicants are not required to follow Rule 53 if they seek to review decision making and can do so under the common law.

Mr Gauntlett on the other hand, pointed out that there would be an irretrievable loss to the applicants if the status *quo ante* were not restored and further contended that the applicants were not culpable with regard to the time taken in bringing the application. In this regard he also referred to paragraph 81 of the founding affidavit in which it was contended (and not squarely disputed) that it would be extremely difficult for the applicants to compute the loss of revenue and damages they would sustain and that there was not a clear remedy for the recovery of damages of this nature so suffered in Namibian law. He also referred to the logistical difficulties faced by the applicants' as foreign litigants in the preparation of the application and submitted that it was prudent for them to await the response on behalf of the Minister to the letter of 17 November 2010.

There is in my view much merit in these submissions. The importance of awaiting that response, and then seeking advice, researching and the like are clearly factors together with logistical difficulties caused by distance and being in different jurisdictions should be taken into account in the exercise of my discretion when considering whether to grant condonation under Rule 6 (12). These factors were referred to in this context in an unreported decision of this Court in *The Three Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd*

and Others where it was held that in assessing urgency a Court could have regard to the factors enumerated in *Radebe v Government of the Republic of South Africa* and others when considering whether there had been unreasonable delay in bringing a review. The following was stated in the *OnQopolo* matter with reference to the factors listed in *Radebe*:

*"I agree that the factors listed, such as a reasonable time to be taken to take all reasonable steps preceding an application including considering and taking advice, attempts to negotiate, obtaining copies of relevant documents and obtaining and preparing affidavits, should also be taken into account, if these are fully and satisfactorily explained, in considering whether an application should be heard as one of urgency. In addition, I agree that in considering the time taken to prepare the necessary papers, allowances should be made for differences in skill and ability between practitioners practising as attorneys and advocates, and that a party cannot be expected to act over hastily, particularly in complex matters. In addition, in this matter, both sets of parties are based in Tsumeb, some distance from this court". 8*

Taking the factors raised by the applicants (in their founding affidavit and especially in paragraphs 78 and 79) into account, I cannot fault the applicants for taking some time "to marshal their forces", as was found in *Corium (Pty) Ltd and Others v Myburgh Park Langebaam (Pty) Ltd and Others*. I accordingly do not find that their delay was culpable. I also take into account that the respondents have not sought a postponement to place further matter before this Court. Nor, as I have said, has any evidential matter been identified by Mr Namandje which the respondents would still need to address. I also take into account that the respondents themselves have been on notice for some time that the applicants may take legal action to challenge the decision making.

In the exercise of my discretion, I accordingly would grant condonation to the applicants for bringing this application as one of urgency under Rule 6(12).

[12] Rule 6(12) plays an important part in everyday litigation. While not losing sight of what has been said in the many cases dealing with urgency in this court, I would respectfully add this; very little has been said about urgency in applications concerning interim interdicts sought pending review applications. I cannot lose sight of the fact that, in terms of the Tender Board Act of Namibia, 1996 “the Tender Act”, all purchases (apart from minor exceptions) made by Government take place through the Tender Board. Literally, billions of Namibian dollars are spent on a yearly basis through this process. While the Tender Act, has lofty ideas; amongst others to give practical manifestation to article 18 of the Constitution, and to root out corruption, those constitutional principles may become empty rhetoric if Rule 6(12) is interpreted in a manner so as to become a hurdle, rather than an aid, to give effect to the principles contained in article 12 and 18 of the Constitution.

[12] Rule 6 (12) is procedural in nature. It regulates the business of the court. The court’s business is to give effect to, amongst others, the provisions of article 12 and 18 of the Constitution. Rule 6(12) is subservient to the provisions of the Constitution. Rule 53 has become, in my view, wholly inept to give manifestation, (in a tender context), to article 12 and 18 to the

Constitution. The rule has its origin in the world which existed in 1957, while, in the meantime, communication, transport and copying of documents have improved vastly. There is no more need, for e.g. to wait thirty court days to make a copy of the record available to applicant. Figuratively speaking, there is no more need to transport the record by cart and horses from Lüderitz to Windhoek. According to certain authorities, the court has a discretion, even in circumstances where there was non compliance with article 18, to refuse to set aside the tender award if the setting aside itself will have no practical consequences or would be a mere academic exercise. Many contracts awarded by the Tender Board, although high in value, are short enough in duration to be outlasted by any court process for a Rule 53 review application in the normal course. Systemic delays have been identified in the Millennium Waste Management-case<sup>4</sup>, where Jafta; JA, said the following at paragraph 34:

*“In conclusion there is one further matter that needs to be mentioned. It appears that in some cases applicants for review approach the High Court promptly for relief but their cases are not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting-aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights becomes drastically reduced. It*

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<sup>4</sup> See infra

*may help if the High Court, to the extent possible, gives priority to these matters.”*

[13] Given the reality that normal<sup>5</sup> court process is inept to provide aggrieved tenderers with substantive relief in due course, Rule 6(12) should preferably not be used as a hurdle before Constitutional rights are preserved or protected. Rather it should be an aid to assist an aggrieved party. Otherwise, the unscrupulous tenderer, having been awarded the tender, must only cross one hurdle to lay his/her hands on the money; he must do his damnest to persuade to court that the matter is not urgent. Once the matter is struck from the roll for lack of urgency, implementation and completion of the tender award becomes paramount; and delivery starts in all earnest. In the mean time, the aggrieved applicant faces various others legal hurdles; is a striking from the roll an urgent application appealable or not? If so, is it with or without leave of the court; and when will the matter be heard in the Supreme Court? But those are not matters bothering an unscrupulous successful tenderer; other than to keep on opposing each and every step taken by the applicant.

[14] I do not suggest for one moment that a successful tender must throw in the towel as soon as an aggrieved person lodges a review application in the normal course. But to give effect to that aggrieved person's article 12 and 18

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<sup>5</sup> I say nothing about the new case management process. Only time will tell. However, if this very same case was dealt with under the new system, it would not have reached management stage as the matter is opposed, and pleadings are not closed. It has been stalled by a pending Rule 30 application.

rights, the following consideration must find applicant; firstly, there must be compliance with the Constitution by the Tender Board and the relevant Ministry involved. Secondly indeed, the exercise of a proper discretion by the court is required when an applicant approaches the court for interim interdict pending the outcome of the main review applications. If the court simply listens, as the respondents want me to do in this case, to a cynical calculation of days, just to conclude that the matter is not urgent, while losing sight of the real business of court, the justice system loses legitimacy. Surely, that is also a factor to take into consideration where a discretion is exercised in terms of Rule 6(12). It is now trite that commercial urgency is sufficient to employ Rule 6(12). Many businesses come to Namibia in the hope of having a speedy resolution to their disputes. Take for instance the Walmart matter<sup>6</sup>. What would the Namibian justice system have been in the eyes of the world if Smuts J, held the matter was not urgent. I have quoted much of what Smuts, J said about urgency in that matter. I entirely agree with his approach.

[15] The principles applicable to an interim interdict are well known. Properly applied, they are capable of dealing with each and every factual situation before court. So is the test which the court should apply when it decides whether or not the matter should be heard as one of urgency. The test is known. It says that the court must assume that the factual allegations made by the applicant i.e. as to the merits of the matter – are correct. On the other hand, the principles applicable to determining whether an interim

<sup>6</sup> Par 11 infra

interdict should be granted are worlds apart from those applicable when urgency is determined. When urgency is determined, counsel arguing the point would be well advised to take these fundamental differences into consideration. It is of no use, when determining urgency, for counsel to delve into the answering affidavits and to point out which allegations (as far as the merits are concerned) are in dispute, simply in an endeavour to win sympathy for the respondent. There is nothing emotional about determining urgency. It is simple. The court assumes that the factual allegations made by the applicant to establish his/her merits (i.e. that he will succeed to set the tender award aside or even that he/she may be the successful tenderer if the process is referred back to the Tender Board). If I say the factual allegations must be assumed to be correct, I mean facts, not submissions or unsubstantiated conclusions. On that basis, and having regard to Rule 6(12), the authorities quoted above, and the other relevant circumstances (some of which I have mentioned) the matter of urgency is determined. Once the court has exercised its discretion, and finds the matter to be urgent, the debate moves to another level. Then the court looks at all the admissible evidence contained in all the affidavits filed of record and applies the Webster vs Mitchell-test<sup>7</sup> as amplified in Gool<sup>8</sup>(hereinafter the Webster test).

### **APPLICATION OF FACTS TO URGENCY IN THIS CASE**

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<sup>7</sup> 1948 (1) SA 1186 W

<sup>8</sup> 1955 (2) SA 682 C



[16] Applying the test for determining urgency, I am satisfied that a case for urgency has been made out. I am not going to deal with each and every fact. Suffice it to say that, if I assume that the allegations of irregularities made by the applicant in its founding affidavit are correct, then a very strong case has been made out (in compliance with what I have stated above, I must emphasize that this conclusion of a “strong case” is based on the assumptions I have to make. It by no means follows that the same conclusion will be reached if the Webster-test is applied for purposes of determining the interdictory relief sought).

[17] I have also come to the conclusion that the applicant was not culpable remiss or guilty of culpable delay before this application was brought. I say this, amongst others, for the following reasons. Article 18 guarantees that when an aggrieved person requires information from the Tender Board, that person is entitled to a prompt response, and a truthful one at that. It is of course so that, prior to the award being made, rival tenderers may not obtain information about their opponents' tenders. But, in my view, once the award has been made, tenderers must accept that the details of the tender will become part of the public domain once the tender process becomes challenged. Such a sacrifice is part and parcel of the right to participate in the tender process.

[18] What happened in this case is that the conduct of the respondents can only be described as obstructive. Letters were not answered, or when it was answered, it was said that instructions must first be obtained, just to never come back to the applicant again. When the applicant required information as to when the contract (pursuant to the tender award) would be signed, it received no response, while the respondents knew, or must have known, that the contract was indeed signed a few days after the main review application was lodged. Nothing of the sort was conveyed to applicant. If the Governmental respondents complied with article 18 of the Constitution, they would have responded in writing to the applicant, stating the truth. Again, nothing of the sort happened. To add insult to injury, Rule 53 – discovery was made almost four months after the main review application was lodged. One must assume that, when the Tender Board gathers to consider an award, each and every member have received copies of the tenders, the advice received from any technical agent appointed by the Tender Board, and all relevant documents. Once the decision is made and minuted, that brings an end to the process. What remains is for handwritten minutes (or perhaps the recording of the meeting) to be typed up. In an open and transparent Society, where the organs of State comply with article 18 of the Constitution, the right to information should not be seen as being postponed until (as in this case) four months after the main review application has been filed. Rule 53 is also subservient to the Constitution. It regulates the business of the court, and

does not take away constitutional rights. The obligation to be transparent is a continuing one, and only limited by the Tender Act and its Regulations.

[19] In my view, where an aggrieved party indicates that he has grounds to challenge a tender award, the Tender Board should co-operate to make information available, where reasonably requested, as soon as possible. This may also alleviate unnecessary fears and prevent unmeritorious application to court. But in this case, the excuses why applicant could not obtain the relevant information immediately were numerous. Amongst others, the Tender Board said that it does not keep copies of the relevant documents after the award is made. It is apparently sent to the Ministry. With respect, then this practise should be changed. Transparency demands that at least one copy is kept (together with the minutes and other relevant document), for a *bona fidei* aggrieved person to inspect it if so requested and make copies at his costs if desired.

[20] These principles did not find application in the tender process under consideration. In my view, the obstructive behavior of the Respondents can only be described as a sorry state of affairs. In these circumstances, it ill behoves the respondents to complain about the delay before applicant lodged this urgent application. The applicant may have moved the applications earlier, but was certainly not *mala fide*, culpable remiss or guilty of culpable delay. I have little doubt that, if respondents informed applicant during the end

of last year that the contract was signed in order to implement the tender, the urgent application would have been made much earlier. After the first urgent application brought no relief for the applicant, it hoped for an early date for the matter to be heard by the Supreme Court. The fact that a date could only be obtained on 15 July this year, is no ones fault, but the delay caused since Ndauendapo; J, “dismissed” the previous application, until applicant decided to bring this second application, was not as a result of *mala fides*, or culpability. Rather this new urgent application was resorted to when applicant realized that the hearing date obtained in the Supreme Court, may not be early enough to have a practical effect in as far as the relief sought in the first urgent application was concerned.

### **RES JUDICATA**

[21] On 7 April 2011, Ndauendapo; J, heard an urgent application between the same parties, for, in essence, the same interdict. The order he made was the following;

*“Yes I have listened to the submissions made, I will make my ruling now and then provide my reasons at a later stage. My ruling is that the application is dismissed with costs, including the cost of three instructed counsel and two instructing counsel.”*

[22] It is not clear whether Ndauendapo; J, struck the matter from the roll for lack of urgency or whether he dismissed the interdictory relief on the merits. But, in normal circumstances, he would have had to, first, grant leave to the applicant to proceed on an urgent basis, and only thereafter could he dismiss the interdictory relief. He did not do so. I must accordingly assume that his “ruling” to “dismiss” the application was aimed at striking the matter from the roll for lack of urgency.

[23] In these circumstances, the respondents raised the plea of *res judicata*. I cannot agree that the principles of *res-judicata* find application. Firstly, the merits were not decided, and even if it was, it would have been done on a *prima-facie* basis, which would not invoke the principles applicable to *res-judicata* (See <sup>9</sup>Tony Ramhe Marketing Agencies SA (Pty) Ltd and Another v Greater Johannesburg Transitional Metropolitan Counsel 1997 (4) SA 213 WLD at 216 A-B, and <sup>10</sup>Zulu V Minister of Defence and Others 2005 (6) SA 446 TPD 446 at 461 C-G). Secondly, urgency is concerned with procedural issues and in this case applicant did not rely on the same facts as in the first urgent application. In <sup>11</sup>Knouwds NO vs Josea and Another 2010(2) NR 754 SC, Strydom; AJA, said the following at paragraph 11;

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<sup>9</sup>Tony Ramhe Marketing Agencies SA (Pty) Ltd and Another v Greater Johannesburg Transitional Metropolitan Counsel 1997 (4) SA 213 WLD at 216 A-B

<sup>10</sup>Zulu V Minister of Defence and Others 2005 (6) SA 446 TPD 446 at 461 C-G

<sup>11</sup>Knouwds NO vs Josea and Another 2010(2) NR 754

*“It is in my opinion clear that the decision by the court a quo was neither final nor was it definitive of the rights of the parties nor did it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The basis on which the court a quo discharged the provisional order was procedural in nature and could be corrected by the appellant by simply correcting its failure to serve the sequestration proceedings on the respondents. For that purpose it could even do so by serving the same application documents. I agree with Mr Van Rooyen *judicata* cannot be raised in those circumstances (See *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977 (2) SA 38 (A)*.) This is a further indication that the court did not finally dispose of the rights of the parties.”*

#### **APPLICATION FOR LEAVE TO APPEAL**

[24] In *Aussenkehr Farms (Pty) Ltd v Minister of Mines and Energy 2005 NR 21 at 33 (B-F)* Strydom; CJ, said the following:

*“A dismissal of an application on the grounds of lack of urgency cannot close the doors of the court to a litigant. A litigant is entitled to bring his case before the court and have it adjudicated by a Judge. If the arguments, raised by Mr Barnard and Mr Rossouw, are taken to their full consequence, it would mean that, at this preliminary stage of the proceedings, a Court would be able to effectively close its doors to a*

*litigant and leave the latter with only a possibility to appeal. To do so would not only incur unnecessary costs but would, in my opinion, also be in conflict with art 12(1)(a) of the Constitution, which guarantees to all persons, in the determination of their civil rights and obligations, the right to a fair and public hearing before a court established by law. I want to make it clear, however, that there may be instances where the finding of a Court that a matter was not urgent, might have a final or definitive bearing on a right which an applicant wanted to protect and where redress at a later stage might not afford such protection. See Moch's case (supra) at 10F-G. In such an instance no leave to appeal would be necessary. However, the present case is not such an instance and there was no reason why the appellants could not seek redress in the ordinary way, by setting the matter down again or, if they wanted to appeal, to comply with the provisions of Act 16 of 1990. A refusal to hear a matter on the basis of urgency may, in the Namibian context, be regarded as what was termed a 'simple interlocutory order' for which leave to appeal would be necessary in terms of s 19(3) of Act 16 of 1990. (See South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 549G- 551A)."*

[25] Recently, in <sup>12</sup>Namib Plains Farming and Tourism v Valencia and Others (unreported judgment of the Supreme Court); Shivute C.J; said;

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<sup>12</sup>Namib Plains Farming and Tourism v Valencia and Others

*“Urgency is not appealable issue in any circumstances”.*

[26] For the proposition, just quoted, the learned Chief Justice referred to the portion I quoted from the Aussenkehr judgment above. In my respectful view, the learned Chief Justice could only have referred to urgency (in as far as the court decided to hear a matter as one of urgency) as not appealable in any circumstances. If not, the two judgments would be conflicting. In any event, it appears from both the Aussenkehr and the Namib Plains – judgment, that a ruling to proceed with a matter on an urgent basis, is not appealable at all. Refusing to hear a matter on urgency is a different issue. Assuming for the moment an innocent party is incarcerated; an urgent application is lodged. Counsel for respondent calculates the days, and submits that the applicant is already one year in prison, and therefore the “delay rule” causes the matter to be struck. Surely, the Supreme Court cannot and will not sit back and hold the matter is not appealable at all.

#### **THE INTERIM INTERDICT**

[27] In my view, the applicant’s application must fail as it did not show that the balance of convenience favours it. Mr Coleman invited me to read the papers again before I hand down the judgment. I did. The founding affidavit does not deal with the balance of convenience at all. It proceeds from the basis that the applicant’s case is clear and therefore the balance of convenience is not important or irrelevant. But, if I apply the Webster-test



(which is something totally different than assuming the allegations to be true for purposes of deciding urgency), I cannot say that applicant's case is open and shut, or so clear, that I should give no weight to the balance of convenience issue.

[28] Amongst others, the applicant does not make out a case that there is a possibility that, if the tender is to be reconsidered, the applicant may be the successful tenderer (I should not be understood to say that such a case must be always be made out, even if an urgent application is lodged immediately after the tender is awarded and the contract has not been implemented yet or is in its beginning stages. But in this case, where the contract is almost completed, it is indeed a relevant consideration. Applicant does make out a case, however, that *prima facie*, the main review will succeed.

[29] In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board Limpopo Province and Others* 2008 (2) SA 481 SCA, Jafta; JA, pointed out that the question of unfairness under consideration in that case was not whether the process of calling the tenders was unfair, but rather whether appellant was unfairly disqualified. Therefore, fresh tenders would not be called for if the Tender Board's award was to be set aside, but rather, the tenders would have had to be re-evaluated. In deciding whether or not to set aside the tender award (after having found that the appellant was unfairly

disqualified) Jafta; JA, identified four interests which needed to be taken into consideration when deciding which order to make. They were;

[29.1] It was by no means clear that the aggrieved party would be successful if the tenders were to be re-evaluated.

[29.2] There was no suggestion that the successful party was complicit in the disqualification (from the tender process) of the aggrieved party.

[29.3] The public interest for the medical waste to be removed from public hospitals had to be continued with uninterruptedly.

[29.4] The public purse was considered. In that case the aggrieved party's tendered was a lower amount than the successful party.

[30] Jafta; JA, then, in essence, continued to point out that the weight each of these four interests should be accorded, could not be determined on the papers before court. The court went on to grant relief in terms of which the award was not set aside immediately, but nevertheless ordered that the tenders should be re-evaluated. This exercise undertaken by the SCA, pretty much resembles that which would take place where a court considers the balance of convenience at interdictory stage.

[31] Turning now to this matter, the most important irregularities complained of by the applicant can be summarized as follows; Firstly, applicant says that, (according to the contract which third respondent annexed to its affidavit in the first urgent application), the price inserted is N\$ 4 million higher than the amount authorized by the Tender Board. But, in its answering affidavit 4<sup>th</sup> respondent's deponent alleges that applicant has made its calculations while using the wrong exchange rate. Applying the Webster test, there is no clear case here.

[32] Secondly, applicant says that third respondent's bid security was issued in the wrong name, and therefore third respondent should have been disqualified. Not so, says first, second and fourth respondents. The bid security has been regarded as adequate. This is not really a satisfactory answer. In my view, what should have been the Tender Board's concern on this aspect was whether, if ABSA was called upon to pay, second respondent would have been entitled to payment? Although the third respondent's answer to applicant's allegations in this regard is also not all together satisfactory (from a detailed perspective) it does say that Vae Perway SA and VAE SA (Pty) Ltd "are as a result of restructuring the same legal entity". If that is so, and given the Webster test, I cannot, at this stage, say that applicant has a clear case on this aspect, albeit that it may indeed have a fairly strong *prima facie* case.

[33] Thirdly, applicant alleges that it did submit a bid security, whereas it was disqualified for not having done so. There appears to be a factual dispute on this issue. From documents annexed by applicant itself, (the Tender Evaluation report) it is indicated that applicant did not submit the required bid security timeously. Although applicant has made out a prima facie case on this aspect, it is not a clear one.

[34] Applicant alleges that many further irregularities occurred. I would have preferred to deal with each one of those, but when I handed down my ruling on Friday 17 June 2011, Mr Coleman for the applicant indicated that his instructions were to apply for leave to appeal, and that reasons are required. I have carefully considered all the complaints made by the applicant, but I cannot come to the conclusion that applicant's prospects of success are so clear and strong, that the balance of convenience should play no part in the enquiry whether to grant an interim interdict or not.

[35] If then, the balance of convenience is considered, I must conclude that it favours the respondents. The fourth respondent has dealt in detail with all the losses it will suffer if the last delivery of rails is stopped. On the other hand, as I have already said, applicant does not deal with the balance of convenience at all in its founding affidavit.

[36] The contract is almost completed. Moreover, as I have already said, on the probabilities, there is no indication that applicant will be successful if the tenders are re-considered. It is a commercial reality that applicant does not manufacture the rails, but must purchase it from third respondent. While the delay in bringing the application cannot be described as a result of culpable remissness, the effect of the delay cannot be ignored when the interim interdict is considered. While the conduct of the Governmental respondents may have been deplorable, I may not, in the exercise of my discretion, turn the common law remedy of interim interdicts, into a purely punitive measure and simply say that, because the Governmental respondents' conduct left much to be desired, the third respondent must be penalized. There is simply no pertinent allegation that third respondent acted *mala fidei* or corruptly during the tender process itself, and after the tender was awarded, it simply did what any private entrepreneur would have done. It executed its obligations. It may have been aware of the fact that, the quicker it complied with its obligations; the better for it, but that cannot alter the balance of convenience which must be determined at this stage.

[37] If this urgent application was heard before the ship departed with the last consignment of rails from Europe, the result may have been different. In such circumstances the public interest argument would not have weighed to heavily with me. In my view, the public interest is equally injured when any tender (which was awarded contrary to the provisions of article 18), is allowed

to be implemented. Presumably all tenders are called for and awarded to serve the public interest, but if such an argument (i.e. that the interdict must be refused because it is in the public interest for the contract to be continued with) becomes the paramount consideration in every interim interdict application which is heard by the court, interim interdicts will never issue. In the long run, much more damage may be done to the public interest if such an approach carries the day on each and every occasion.

[38] The applicant failed to deal with the balance of convenience in its founding affidavit, and can only blame itself for not doing so. The aspect of the public purse (applicant is more expensive than third respondent), together with the fact that I am not inclined to grant an interim interdict which would, by and large, simply be punitive in nature (while ignoring the specific status of the contract i.e. that it has for all practical intents and purposes been completed), drives me to the conclusion that the application must be refused.

[39] I think, however that, given the circumstances of this case, each party should pay its own costs.

Dated at WINDHOEK on this 22<sup>nd</sup> day of JUNE 2011.

A handwritten signature in cursive script that reads "A.J. Heathcote". The signature is written in black ink and features a prominent, sweeping underline that extends across the width of the name.

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HEATHCOTE, A.J