

CASE NO.: A 149/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AMSWOHL & LGA CONSTRUCTION JV CC

APPLICANT

and

**THE MUNICIPAL COUNCIL OF THE MUNICIPALITY
OF NAMIBIA**

RESPONDENT

CORAM: KAUTA, AJ

HEARD ON: 19TH JULY 2012

RELEASED ON: 27TH JULY 2012

JUDGEMENT

KAUTA, AJ: [1] The Applicant approached this Court on an urgent basis for an interdict and certain ancillary relief. After hearing oral argument on 19 July 2012 I reserved judgment. The Applicant sought an order in the following terms:

1. Condoning Applicant's non-compliance with the forms and service provided for in the Rules and authorizing the Applicants to bring this application on an urgent basis as contemplated in Rule 6(12) of the Rules of Court.
2. Interdicting and restraining the Respondent directly or indirectly, and through its servants or agents or otherwise, from:
 - 2.1 interfering with Applicant's right to work and performing the contracts works, being the subject matter of an agreement concluded between Applicant and Respondent on or about 29 May 2012 relating to the construction of civil services in Gobabis in consequence to the successful award of Tender GN 01/2012 by Respondent to Applicant; and
 - 2.2 implementing or otherwise giving effect to the purported suspension of the above agreement by the Respondent with effect from 7 June 2012.
3. That paragraphs 2.1 and 2.2 above will operate forthwith as interdicts *pendent lite*.
4. That Respondent pays the costs of this application.

BACKGROUND

[2] The Government of the Republic of Namibia through its Targeted Intervention Programme for Employment and Economics Growth (TIPEEG) provided funds to the Respondent for the development of certain infrastructure in Gobabis. The intention it appears was to uplift the

communities in Gobabis with the provision of water, sewage and road infrastructure. To this end the Permanent Secretary of the Ministry of Regional and Local Government, Housing and Rural Development appointed Element Consulting Engineers on the 6th of September 2011, on behalf of the Respondent.

[3] The Respondent advertised a tender for the construction of civil services in Gobabis, namely Tender No: GN 01/2012. The closing date of this tender was Friday, 24 February 2012 at 11h00.

[4] The Applicant participated in the tender as did two other entities that are not party to this application.

[5] The crisp and decisive issue calling for decision is whether the Respondent awarded Tender No: GN 01/2012 to the Applicant. In determining this issue it is important to decide whether the Respondent is estopped by conduct. It is to this issue I turn after a brief exposition of the facts in this matter.

[6] The Applicant's critical averments in support of its application are that it was awarded Tender No: GN 01/2012 and agreements were concluded on or about 29 May 2012. The contract agreement with the Applicant is signed by the Town Engineer and Manager of Finance of the Respondent. Due to the nature of the defense raised by the Respondent, the Applicant contends that the Respondent by the application of the turquand rule is bound by the conduct of its officials. The Applicant makes this averment because of a letter written by the Chief Executive Officer of the Respondent on the 21st of May 2012 to appoint Applicant. To bolster the above ascertain the Applicant also rely on the fact that the Chief Executive Officer of the Respondent was present when the agreement was concluded and signed between the parties. It is not disputed that a formal site handover took place on the 29th of May 2012 and despite the

presence of the Chief Executive Officer of the Respondent there were no objections thereto.

[7] In answer to these critical facts the Respondent asserts that its Local Tender Board resolved “*to consider awarding the tender to Amswohl & LGAJV*”. And consequently mandated its Chief Executive Officer on 21st May 2012 to “*confirmed that the appointment of the highest scoring tenderer namely Amswohl & LGAJV can be effected without delay, so that negotiations can only take place after appointment*”. The Respondent further take issue with the fact that the contract agreement with Applicant is not signed by its Chief Executive Officer as provided for in Section 31A of the Local Authorities Act No. 23 of 1992. As a result of the above the Respondent take the view that it’s Local Tender Board made no award in accordance with the Tender Board of Namibia Act No. 16 of 1996. In substantiation of its position the Respondent relies on the minutes of its Tender Board of the 8th of May 2012, which resolved among others that Applicant “*be engaged in negotiations in terms of rates*” and a letter to this effect was written by its Chief Executive Officer. It appears that the Consulting Engineers wrote to the Applicant on the 22nd of May 2012 and appointed them. When the defense of the Respondent is striped to the bone it is essentially that even if the Applicant proves the existence of the agreement it is null and void.

[8] It is obvious that the parties are not ad idem on whether an agreement was concluded in this matter. The approach which must be followed in resolving disputes of fact has been qualified in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635A. Corbett JA (as he then was) in this regard stated:

‘Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule

was stated by Van Wyk J in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G, to be

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order. Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted".

[9] In *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) Miller JA remarked as follows at 430G-431A:

'A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril, for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1168.) But if, notwithstanding that there are facts in dispute on the papers before it, the Court is satisfied that on the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, the applicant is entitled to relief (whether in respect of all his claims or one or more of them) it will make an order giving effect to such finding, with an appropriate order as to costs. (Cf *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235; *Burnkloof Caterers (Pty) Ltd v Horseshoe H Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938.)'

[10] The Respondent is a creature of statute. The powers and duties of the Council of the Respondent are derived from the Local Authorities Act 23 of 1992, as amended, in particulars by the Local Authorities Amendment Act 24 of 2000. In Part IV, Section 27(5) of the Act deals with the powers and duties of Chief Executive Officers (CEOs). Such powers

and duties may be exercised by the CEO personally or by any officer or any employee (determined by him) engaged in the carrying out of such provisions under the CEO's direction and control. Part V deals with the powers and duties of Local Authority Councils, such as the Council of the Respondent. Section 30 of the Act deals with what such Council may do. Despite the specific powers of such Council may have, it may generally do anything necessary or conducive to the exercise of its powers. Section 30(4) provided that anything that has purportedly been done by the chairperson of such Council, on instruction of the Council in terms of the powers vested in the Council by the act or any other law, shall be deemed to have been done by Local Authority Council. Section 31 (as amended by Act 24 of 2000) specifically deals with the delegation of powers by Local Authority Councils. It provides:

"31(1) A municipal council or a town council may delegate or assign, in writing and on such conditions as it may determine, to its management committee or chief executive or any other staff member, any power conferred or any duty imposed upon it by or under this Act or any other law, except any power..."

Section 31(3) and (4) provides:

"(3) The management committee may delegate, in writing and with the prior written approval of and on the conditions determined by the municipal council or town council concerned:

- (a) any power conferred upon it by this Act; or
- (b) any power which has been delegated to it subsection (1), to any member of the municipal council or town council, or to the chief executive officer or any staff member of the municipal council or town council concerned, or to any two or more of such persons conjointly.

(4) Local authority council or a management committee shall not be divested of any power delegated or assigned by it under subsections (1), (2) or (3), as the case may be and may alter or withdraw any decision given by the delegate in the exercise of such delegated power"

[11] By an amendment (Act 24 of 2000) Parliament inserted in the Local Authorities Act a new section namely Section 31A, in respect of signed of contracts. This section provides:

“any contract to be entered into by a local authority council pursuant to a resolution of the local authority council shall be signed by the chief executive officer of the local authority council and be co-signed by:

(a) In the case of municipal council or town council, the chairperson of the management committee or any staff member of that council generally or specifically authorized thereof by the council concerned;

(b) In the case of a village council.....[not applicable]

and any contract so signed shall be deemed to have been duly executed on behalf of the local authority council”.

[12] This matter is further complicated by Section 16 of the Tender Board of Namibia Act No. 16 of 1996, which provides that:

“(1) The Board shall in every particular case-

(a) notify the tenderers concerned in writing of the acceptance or rejection of their tenders, as the case may be, and the name of the tenderer whose tender has been accepted by the Board shall be made known to all the other tenderers;

(b) on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.

(2) Where in terms of a title of tender-

(a) a written agreement is required to be concluded after the acceptance of a tender, the Board and the tenderer concerned shall, within 30 days from the date on which that tenderer was notified accordingly in terms of subsection (1)(a) or within such extended period as the Board may determine, enter into such an agreement;

(b) a written agreement is not required to be so concluded, an agreement shall come into force on the date on which the tenderer concerned is notified in terms of subsection (1)(a) of the acceptance of his or her tender.

(3) If, in the circumstances contemplated in subsection (2)(a), the tenderer fails to enter into an agreement within the period mentioned in that subsection or, if that period has been extended by the Board, within the extended period, or if the tenderer, when required to do so, fails to furnish the required security for the performance of the agreement, the Board may withdraw its acceptance of the tender in question and-

- (a) accept any other tender from among the tenders submitted to it; or
- (b) invite tenders afresh.

[13] In *Oshakati Towers (Pty) Ltd v Executive Properties CC and Others* 2009 (1) NR 232 at 245 G - H, (HC) Muller, J remarked that:

“....non-compliance with a statutory requirement may render contracts unenforceable, depending on the intention of the legislature”.

[14] The remarks of Miller AJA, In *Northgate Properties (Pty) Ltd v The Town Council of the Municipality of Helao Nafidi and 4 Others* (HC), Case No. A 350/2008 heard on 1st April 2011 and delivered on 5th May 2011 at para [11] are apposite in this matter:

“My finding that Mr Shivolo [the Chief Executive Officer] did not have the authority of the first respondent to sell and the consent of the relevant Minister, leads to the inevitable finding that the sale was null and void ab initio. To that I must add that in terms of section 31A of the Local Authorities Act, any contract entered into shall be signed by the Chief Executive Officer of the Local Authority Council and shall be co-signed in the case of a municipality or a town council by the chairman of the

management committee or any staff member of that council generally or specifically authorized thereto. This provision is plainly cast in peremptory terms and the failure in the instant case to comply with the provision provides a further basis upon which the agreement is null and void.”

[15] The onus is on the Applicant to prove the conclusion of a valid agreement in this matter. Neither the Applicant nor the Respondent deemed it necessary to resolve this issue with an explanation by the Chief Executive Officer of the Respondent. This would no doubt have resolved the stance taken by the Applicant. What is clear from the facts is that there is no semblance of compliance with the provisions of Section 31A.