

**REPUBLIC OF NAMIBIA**



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

**RULING**

Case no: HC-MD-CIV-MOT-REV-2022/00155

In the matter between:

**MENZIES AVIATION (NAMIBIA) (PTY) LTD**

**APPLICANT**

and

**NAMIBIA AIRPORTS COMPANY LTD**

**1<sup>ST</sup> RESPONDENT**

**PARAGON INVESTMENT HOLDINGS (PTY) LTD**

**2<sup>ND</sup> RESPONDENT**

**JV ETHIOPIAN AIRLINES**

**SKYE AVIATION SERVICES (PTY) LTD**

**3<sup>RD</sup> RESPONDENT**

**NAMIBIA FLIGHT SUPPORT CC JV EQUITY AVIATION**

**4<sup>TH</sup> RESPONDENT**

**KINGS GROUND AIRPORT SERVICES (PTY) LTD**

**5<sup>TH</sup> RESPONDENT**

**MENELL INVESTMENT CC JV NAS**

**6<sup>TH</sup> RESPONDENT**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA**

**7<sup>TH</sup> RESPONDENT**

**CHAIRPERSON OF THE REVIEW PANEL**

**8<sup>TH</sup> RESPONDENT**

**GOVERNMENT ATTORNEY**

**9<sup>TH</sup> RESPONDENT**

**GOVERNMENT ATTORNEY**

**10<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-REV-2022/00155) [2024] NAHCMD 139 (28 March 2024)

**Coram:** RAKOW J

**Heard:** 20 February 2024

**Delivered:** 28 March 2024

**Flynote:** Application – Oral evidence application – Non-joinder application – The referral sought is based on credible evidence and is not simply an abuse of process by an unscrupulous litigant – The referral is convenient, because the issues are clearly defined, the dispute is comparatively simple and a ‘speedy determination’ of the dispute is desirable and in fact achievable – The Bid Evaluation Committee does not have a direct and substantial interest in the legal matter and should therefore not be joined.

**Summary:** On 13 April 2022, the applicant launched the current review application still pending before this court and still needs to be decided. A number of applications before various judges of the High Court followed. In all of these, judgments were made and against some of these judgments, appeals in the Supreme Court are currently pending. The only remaining matter currently in the High Court, is the current review matter before court.

There are currently two applications before court, the first being an application by the applicant for the hearing of oral evidence and the second one of non-joinder of the Chairperson of the Bid Evaluation Committee by the second respondent.

*Held that:* it is clear that the referral sought is based on credible evidence and is not simply an abuse of process by an unscrupulous litigant. The court further finds that the referral is convenient, because the issues are clearly defined, the dispute is comparatively simple and a ‘speedy determination’ of the dispute is desirable and in fact achievable.

*Held that:* in granting or dismissing an application to refer affidavit evidence to evidence *viva voce*, the court exercises a discretion. In this instance Menzies has made out a case for the exercise of this discretion in favour of the referral to oral evidence for purposes of cross-examination.

*Held further that:* after evaluation of the arguments placed before court, the court finds that the Bid Evaluation Committee does not have a direct and substantial interest in the legal matter and should therefore not be joined.

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### **ORDER**

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1. The matter is referred to hear oral evidence regarding the issues raised by the applicant in the case management report.
  2. The joinder application is dismissed.
  3. The respondents who opposed the application for referral to oral evidence are jointly and severally ordered to pay the cost of this application.
  4. The second respondent is ordered to pay the costs of the joinder application.
  5. The matter is postponed to 16 April 2024 at 15h30 for the determination of a hearing date of the oral evidence.
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### **JUDGMENT**

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RAKOW J:

#### Background

[1] On 1 January 2014, the first respondent and the applicant concluded a ground-handling services agreement ("the Agreement") for five years, in other words, the agreement had to endure from 1 January 2014 to 31 December 2018. The agreement was extended on 1 January 2019 to 31 December 2021. On 1 January 2022, the parties agreed to an extension by means of an addendum for a period of six months, with an end date of 30 June 2022. In addition, the addendum provided by way of clause 3.2 for a one-month cancellation notice.

[2] As the first respondent is a public enterprise, it needs to follow the public procurement process as prescribed in the Public Procurement Act 15 of 2015. It accordingly issued an invitation for bids for providing ground-handling services in August 2021. The tender for the provision of ground-handling services at Hosea Kutako International Airport was awarded to the second respondent on 13 December 2021. The first respondent entered into a contract for the purposes of providing ground-handling services at Hosea Kutako International Airport with the second respondent on 9 February 2022. The applicant informed the first respondent on 7 April 2022 of its intention that the second respondent will not be permitted to take over any ground-handling operations and that the applicant will continue to render these services until further notice.

[3] On 13 April 2022, the applicant launched the current review application still pending before this court and still needs to be decided. A number of applications before various judges of the High Court followed. In all of these, judgments were made and against some of these judgments, appeals in the Supreme Court are currently pending. The only remaining matter currently in the High Court, is the current review matter before court.

[4] There are currently two applications before court, the first being an application by the applicant for the hearing of oral evidence and the second one of non-joinder of the Chairperson of the Bid Evaluation Committee by the second respondent.

[5] According to Menzies the following questions/enquiries need to be referred to cross examination:

(a) Is the uninitialed financial document of Paragon, which was uploaded on e-Justice on 11 May 2022, the same document that was submitted by Paragon to the NAC when Paragon submitted its tender to the NAC when Paragon submitted its tender to the NAC? And if so, did Paragon and the NAC act in cahoots to upload an altered version after the defect was pointed out by Menzies?

(b) The question of the NAC's bias in favour of Paragon and against Menzies (and the other bidders) based on the following factual disputes:

- i. Why was the draft contract included in the bidding documents and the Paragon bid itself different from the eventual contract that was signed.
  - ii. The circumstances under which Paragon received 100% for its bid; where upon a consideration of Paragon's tender, it should have been scored at a maximum of 42 points out of a possible 100.
  - iii. Why was Paragon not disqualified because there are documents (and pages of the Paragon tender document) which were not initialled. The enquiry is further why in these circumstances, and by virtue of the NAC being enjoined to treat all bidders equal as contemplated in Article 10(1) of the Constitution, this was not done.
  - iv. Why, in the face of clear contraventions (in regard to outdated ground handling service equipment put forward by Paragon) Paragon nevertheless, was awarded the tender.
  - v. Why Paragon was not disqualified for tendering in USD as opposed to NAD.
  - vi. Why Paragon was not disqualified or penalised for making the portion requiring an indication whether or not subcontractors would be used (by Paragon) as being "N/A" (in other words not applicable).
  - vii. Why, in circumstances, where the NAC has learned that there were forged signatures of both Mr Amunyela as well as Mr Barega (which factors were confirmed under oath by Mr Amunyela) the NAC has not taken any steps to end the contract, but instead vigorously opposes the review application and all facets thereto.
  - viii. Whether, given the fact that it is admitted on the papers that Mr Barega's signature was forged, and in the absence of any confirmatory affidavit by any authorised person of Ethiopian Airlines, there is indeed (and in actual fact) a relationship and bona fide relationship and joint venture between Paragon and Ethiopian Airlines.
- (c) Whether the award to Paragon exceeded the threshold as discussed in paragraph 3(2) below.
- (d) Whether a 'joint venture', as discussed in paragraph 3(3) below, could become a successful tenderer.'

### Arguments by the parties

### Hearing oral evidence

[6] The applicant contends that there is a factual dispute which has now arisen in respect to certain key issues, and particularly whether the Paragon Bid was properly

signed. If Menzies version is right, Paragon and the NAC are most likely guilty of corruption and fraud, and Paragon should not only be disqualified to continue with the contract, and immediately so, but should be barred from ever participating in any tender again. Menzies contends that this issue needs to be referred to cross examination.

[7] The dispute of fact that the court is asked to refer to oral evidence by the applicant, and to permit Menzies to cross-examine on, is confined to one specific issue, which is simply this: 'Is the uninitialed financial document of Paragon, which was uploaded on e-justice on 11 May 2022, the same document that was submitted by Paragon to the NAC when Paragon submitted its tender to the NAC? and if so, did Paragon and NAC act in cahoots to upload an altered version after the defect 5 was pointed out by Menzies?'

[8] The applicant submitted that the papers – on Menzies version – demonstrate that Paragon submitted a tender which included the financial document bundle. However, this entire document was not initialed. Yet, because Paragon and the NAC were in cahoots, they arranged for the document to be initialed after this review application was lodged by Menzies. That is the only rational explanation why an unsigned version – uploaded on 11 May 2022 – was subsequently substituted and uploaded – and after this was raised by Menzies – with a new, now neatly initialed version.

[9] It was further argued that the dispute of fact has arisen out of a scenario where the NAC admits that a portion of the Paragon bid was not signed, but “avoids” this by providing an explanation, which in turn is contradicted by independent (and objective) evidence provided to Menzies by an independent witness. There were a number of further factual contradictions found by the applicants, being the issue of the bid exceeding the threshold and bid ceiling denials, the issue of bias and discrimination and then the conduct of the legal practitioner of the first defendant, Mr Shikongo.

[10] By the first respondent, it was argued that Menzies failed to plead the facts which meet its requirements as required by rule 67(1) of the High Court Rules which provides that this court may, in limited circumstances, refer an issue arising in motion proceedings for the hearing of oral evidence. But then those circumstances must be both pleaded and established in the founding affidavit.

[11] It was further argued by the first respondent that no proper basis is shown by Menzies why the application cannot properly be determined on the affidavits. In its supplementary founding affidavit Menzies purported basis for referral to cross-examination are set out at paragraph 233, they are spurious.

[12] For the second respondent it was argued that rule 67 is to the effect that where an application cannot be properly decided on the affidavits the court may dismiss the application as the default position and it is only in the circumstances where it considers suitable or proper with the view to ensuring a just and expeditious decision it may, amongst other, direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact.

[13] It was pointed out that it was incumbent on the applicant to convince the court that the application cannot be properly decided on affidavit; and, secondly, that it is suitable and proper with the view to ensuring a just and expeditious decision that oral evidence on a specified issue is ordered.

#### Arguments on the non-joinder

[14] It was argued by the second respondent who raised this point that notwithstanding a direct attack on the Bid Evaluation Committee decision which disqualified Menzies bid in terms of section 52(3) of the Public Procurement Act and allegations against that committee, the chairperson of the Bid Evaluation Committee is not cited as a party in terms of rule 76(1) of the Rules of the High Court, as required. Furthermore, the chairperson of the procurement committee which selected Paragon's bid and which recommended to the Namibian Airport Company's accounting officer, has not been cited.

[15] It was further pointed out that the fact that the chairperson of the Bid Evaluation Committee has not been cited means that there is no proper and effective attack on the Bid Evaluation Committee's decision to disqualify Menzies bid. This is because the chairperson of that committee is a necessary party to the proceedings. It is only that committee – which took that decision – no one else. The committee through its Chairperson must thus be a party – for the court to make an enforceable order.

[16] It was also argued that the consequence of this would mean that, even assuming that Menzies review on the decision by the procurement committee to award the bid to Paragon were to proceed and succeed. Menzies bid would not be part of the referral back to the procurement committee as it has been properly disqualified, and that decision remains extant. It is for this reason that Paragon directly and explicitly raised the issue of non-joinder of the Bid Evaluation Committee through its chairperson. If the court were to uphold Paragon's non-joinder point, it is entitled to dismiss the application, alternatively to stay it until the proper citation of the chairperson of the Bid Evaluation Committee.

[17] On behalf of the applicant it was argued that the point is bad on a number of levels. Firstly, because the Bid Evaluation Committee is not a legally recognised person who may be able to litigate or be joined. Secondly, the Bid Evaluation Committee makes no decision. As its name suggests, it simply makes recommendations. It is for the Namibia Airports Company to accept or reject the recommendation of the Bid Evaluation Committee. But if a fatally flawed recommendation is adopted, then that fatally flawed recommendation becomes the decision of the Namibia Airports Company. It is then the Namibia Airports Company's decision which will be set aside, not the recommendations of its in-house employees.

[18] The applicant then illustrated its argument by using certain examples. It referred to instances where, for example the Law Society will make recommendations to the Judicial Service Commission who in turn will make recommendations to the President. None of these recommendations have the effect



of an appointment, only the President can do this. Or for example in a disciplinary hearing, a domestic chairperson will recommend a sanction to the employer, it is not the chairperson who executes it, but rather the employer. Therefore, one will be strained to find examples of non-joinder points successfully taken against the failure to join the domestic chairperson. This is because, firstly the chairperson decides nothing (she only recommends) and secondly, she is not distinct from the employer.

### Legal positions

#### Referral for cross-examination

[19] Rule 67(1) provides that:

‘Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may (a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness.’

[20] In *Executive Properties CC and Another v Oshakati Tower (Pty) Ltd and Others*,<sup>1</sup> Strydom AJA said the following regarding the test for a matter to be referred for oral evidence to be heard:

‘In the *Room Hire*<sup>2</sup> case the Court stated that one of the clearest ways in which a dispute of fact arises is “(a) when the respondent denies all the material allegations made by the various deponents on the applicant’s behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva*

<sup>1</sup> *Executive Properties CC and Another v Oshakati Tower (Pty) Ltd and Another* (SA 35 of 2009) [2012] NASC 14 (13 August 2012).

<sup>2</sup> *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3)SA 1155 (TPD).

voce if subpoenaed". Mr. Heathcote submitted that it was particularly this excerpt from the case which applied to the present matter.

[34] In instances where application is made to refer evidence on affidavit to evidence *viva voce* the general rule laid down by the South African Appeal Court in the case of *Hilleke v Levy* 1946 AD 214 is as follows:

"In *Prinsloo v Shaw* (1938 AD 570) it was said that it is not disputed that the general rule of our practice is that, where the material facts are in dispute, a final interdict will not be granted merely on the affidavits. In *Mahomed v Melk*(1930, T.P.D. 615), which was an application for sequestration, it was held that even where, on the affidavits, there was a balance of probabilities in favour of the creditor's version, the Court must be satisfied that a *viva voce* examination and cross-examination will not disturb this balance of probabilities before making an order for sequestration on affidavits.(p 219.)"

[35] More recently the test was restated in the case of *Kalil v Decotex (Pty) Ltd and Another*, 1988 (1) SA 943 (AD) at 979 H – I as follows:

"Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent."

[36] In the matter of *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*, 2008 (2) SA 184 (SCA) at 204, Cloete, JA, also dealt with the principles applicable where an application was launched to refer the matter to evidence *viva voce*, and stated as follows:

"[55] No affidavits were filed by valuers employed by, or officials in the employ of or who had been in the employ of, the respondents who had personal knowledge of what had transpired when the properties were valued and the purchase prices determined. There was no indication that such persons were available to the respondents, or would give evidence in support of the allegations of fraud if subpoenaed.

[56] Where a respondent makes averments which, if proved, would constitute a defence to the applicant's claim, but is unable to produce an affidavit that contains allegations which *prima facie* establish that defence, the respondent should in my view, subject to what follows, be entitled to invoke Land Claims Court Rule 33(8) or Uniform Rule of Court 6(5)(g). Such a case differs from the situation discussed in *Peterson v Cuthbert & Co Ltd* and the *Room Hire* case, alluded to in that part of the *Plascon-Evans* decision quoted in para [24] above which refers to those two cases. There, the respondent puts in issue the facts relied upon by the applicant for the relief sought by the latter. In the situation presently being considered the respondent may not dispute the facts alleged by the applicant, but do seek an opportunity to prove allegations which would constitute a defence to the applicant's claim. In the former case the respondent in effect says: given the opportunity, I propose showing that the applicant will not be able to establish the facts which it must establish in order to obtain the relief it seeks; and in the latter the respondent in effect says: given the opportunity, I propose showing that even if the facts alleged by the applicant are true, I can prove a defence. (It is no answer to say that motion proceedings must be decided on the version of the respondent even when the onus of proving that version rests upon the respondent, because *ex hypothesi* the respondent is unable to produce evidence in affidavit form in support of its version.) It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly, and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent."

(See further in this regard *Trust Bank van Afrika v Western Bank en Andere*, 1978 (4) 281 (AA) at 294G – 295A; *Wiese v Joubert en Andere*, 1983 (4) SA 182 (OPA) at 201E – H and *Bocimar NV v Kotor Overseas Shipping Ltd*, 1994 (2) 563 (AD) at 587C – G.)

[37] A reference to evidence *viva voce* will generally only be granted where, in the words of Fleming, J, "it is found 'convenient', wherethe issues are 'clearly defined', the dispute is 'comparatively simple' and a 'speedy determination' of the dispute is 'desirable'." (*Standard Bank of South Africa Ltd v Neugarten and Others*, 1987 (3) SA 695 (WLD) at 699F). (See further *Room Hire*-case, *supra*, 1164, 1165 and *Wiese v Joubert*, *supra*, at 202C-E.)'

[21] The first respondent's counsel sets out a very short summary of the applicable trite principles as follows:

- a) First, courts take a 'robust common-sense approach to disputes of fact in motion proceedings.<sup>3</sup> This is because, "otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."<sup>4</sup>
- b) Second, there must be a genuine factual dispute that can only be resolved through the hearing of oral evidence.<sup>5</sup> The South African Supreme Court of Appeal has held that '[a] real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.'<sup>6</sup>
- c) Third, courts will not refer a matter to oral evidence unless it will disturb the balance of probabilities arising from the papers in favour of the applicant.<sup>7</sup> In the seminal *South African case of Kalil v Decotex (Pty) Ltd*<sup>8</sup>, Corbett JA (as he then was) held as follows:

'Naturally, in exercising this discretion the court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour.'

[22] In *Gaya v Rittman*<sup>9</sup>, Angula AJ (as he then was) held that:

<sup>3</sup> *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H.

<sup>4</sup> *Ibid.* See too *Witvlei Meat (Pty)Ltd v Agricultural Bank of Namibia* (A224-2015) NAHMCD (delivered on 7 April 2016), Parker AJ rejected contentions made by the respondent that "this court will be unable to determine the matter on affidavits as the material requisites of the relief sought are materially disputed by the respondent" by deploying the test and principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and earlier Namibian authorities.

<sup>5</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I. See too: *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para 13.

<sup>6</sup> *Ibid* at para 13 or 375G.

<sup>7</sup> Erasmus at D1-75.

<sup>8</sup> *Kalil v Decotex (Pty) Ltd* 1998 (1) SA 943 (A) followed in Namibia in *Executive Properties CC and another v Oshakati Tower (Pty) Ltd and Others* 2013 (1) NR 157 (SC).

<sup>9</sup> *Gaya v Rittmann N.O* (A 78/2015) [2016] NAHCMD 388 (12 December 2016).

[38] In certain instances the denial by the respondent of the facts alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of facts. In such instance rule 67(1) may be dispensed with if the court is satisfied that the party who raised the dispute has in his affidavit seriously addressed the fact said to be disputed.'

[39] Upon careful evaluation of the allegation in the papers, it is apparent that no genuine dispute of fact is raised in respect of the allegation of forgery or fraud in the redistribution agreement. The remainder of the issues said to be denied, do not raise genuine disputes between the parties. I shall revert to this point later in this judgment; save to hold that there is no genuine dispute of facts that could not be resolved on the papers.'

### Joinder

[23] The Supreme Court of Namibia in *Namibia Protection Services (Pty) Ltd v PIS Security Services Close Corporation*<sup>10</sup> at paragraphs 14 and 15 recently stated that:

'[14] Rule 76(1) of the High Court makes it clear that when it comes to reviews, such applications must be directed at the 'chairperson of the tribunal' whose decision is sought to be set aside. To cite the chairperson in his or her official capacity as such is sufficient as he or she is the representative of the Tribunal. The separate citation of the Tribunal is not necessary. This has been the position for decades.

[15] In a review application, the Notice of Motion is thus directed at the chairperson of the tribunal (the board) in his or her representative capacity for and on behalf of the tribunal and the citation of the tribunal (the board) as a separate party is not necessary. An applicant who cites both the chairperson in his or her representative capacity and the tribunal (the board) should thus be held liable for any wasted costs of this double citation.'

[24] A direct and substantial interest has been held to be:<sup>11</sup> 'an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.' It is a 'legal interest in the subject matter of litigation, excluding an indirect and commercial interest only'. The possibility of such

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<sup>10</sup> *Namibia Protection Services (Pty) Ltd v PIS Security Services Close Corporation* (SA 99/2020) 2023 NASC (5 April 2023).

<sup>11</sup> Herbstein & Van Winsen, *The Civil Practise of the Supreme Court of South Africa*, Page 168, Third Edition

an interest is sufficient and it is not necessary for the court to determine that it, in fact exists.

[25] In *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*<sup>12</sup> Damaseb J held that:

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

[26] In *Kamwi v the Minister of Lands and Resettlement*<sup>13</sup>, it was held that:

[17] The test for joinder is a direct interest in the outcome of a suit.<sup>14</sup> The persons to be joined as parties to the proceedings, must have a direct and substantial interest not only in the subject matter of the litigation, but also the outcome of the proceedings.'

[27] In *Ondonga Traditional Authority v Oukwanyama Traditional Authority*<sup>15</sup>, it was held that:

[15] It is on the strength of these authorities above that it is incumbent upon any court to ensure that all persons, with the requisite interest in the subject matter of the dispute and whose rights may be affected, are before the Court since it is for all intents and purposes in line with the strict requirements of the rules of natural justice, the *audi alteram partem* rule.

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<sup>12</sup> *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011(2) NR 437.

<sup>13</sup> *Kamwi v Minister of Lands and Resettlement* (HC-MD-CIV-MOT-GEN-2016/00333) [2022] NAHCMD 282 (8 June 2022) at para 17.

<sup>14</sup> *Maletzky v Zaaluka; Maletzkey v Hope Village* (I 492/2012; I 3274/2011) [2013] NAHCMD 343 (19 November 2013) para 41.

<sup>15</sup> *Ondonga Traditional Authority v Oukwanyama Traditional Authority* (A 44-2013) [2015] NAHCMD 170 (27 July 2015).

The substantial interest factor attracts a lot of judicial importance to an extent that the courts have assumed a right to raise it *mero motu* where justice so demands .....<sup>16</sup>

[28] This Court in *African Stars Sports Club (Pty) Ltd v Collin Benjamin In his capacity as Trustee of BKK Sport Auas Sport Trust and Others*<sup>17</sup> addressed the approach to pleading a point of non-joinder. The Court directed as follows:

[48] The law is replete with judgments dealing with the need to join a party to proceedings when that party has a direct and substantial interest in the outcome of the matter, or whose interests would be affected by the carrying out of the order in question. These are allegations that must be stated clearly in the papers, with the interest and the prejudice likely to be visited upon the party alleged not to have been joined. It is not automatic that once one raises non-joinder and no more, that party is an interested party. In this matter, the case was not made out with the necessary clarity and precision.

[49] These are not issues that may be obliquely pleaded with the hope that the flesh will be added to the bare and dry bones in argument. The discipline in motion proceedings requires that all the relevant considerations and allegations of fact are pleaded in order to leave the court and the other party in no doubt as to the nature and basis of the complaint advanced. In the absence of the nature and basis of the interest by the NFA, I am of the view that the point taken by the respondents is not meritorious. The court and the other party must not be left ruminating incessantly, spending sleepless nights in nocturnal surmise as to the nature and basis of the interest of the party alleged to exist.'

## Conclusion

### Discussion on the leading of oral evidence.

[29] The court when considering whether to refer the matter for oral evidence took into account that the applicant pointed out to the court instances in the pleadings where evidence is contradicting each other and where it is clear that such evidence should be cleared up in order to understand what the real issue before court is. This issue should be a real issue and the court has identified the biggest of these, being

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<sup>16</sup> *Independence Catering (Pty) Ltd and Others v Minister of Defence and Others* 2014 (4) NR 1085 (HC) at para 24)and 250.

<sup>17</sup> *African Stars Sports Club (Pty) Ltd v Collin Benjamin In his capacity as Trustee of BKK Sport Auas Sport Trust and Others* (HC-MD-CIV-MOT-GEN 155 of 2021) [2021] NAHCMD 263 (27 May 2021).

that part of the application of the second respondent was allegedly not signed on behalf of the second respondent. Why the court is alive to this issue is because the non-signing of documents was one of the reasons for finding the applicant's bid non-responsive.

[30] It is clear that the referral sought is based on credible evidence and is not simply an abuse of process by an unscrupulous litigant. The court further finds that the referral is convenient, because the issues are clearly defined, the dispute is comparatively simple and a 'speedy determination' of the dispute is desirable and in fact achievable. In granting or dismissing an application to refer affidavit evidence to evidence *viva voce*, the court exercises a discretion. In this instance, Menzies has made out a case for the exercise of this discretion in favour of the referral to oral evidence for purposes of cross-examination to determine:

'Is the uninitialed financial document of Paragon, which was uploaded on eJustice on 11 May 2022, the same document that was submitted by Paragon to the NAC when Paragon submitted its tender to the NAC? and if so, did Paragon and NAC act in cahoots to upload an altered version after the defect was pointed out by Menzies?'

#### Discussion of the joinder application

[31] The question the court has to answer is whether the Bid Evaluation Committee have a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court?'

[32] The function of the Bid Evaluation Committee in the procurement process is clearly set out in the Public Procurement Act 15 of 2015. Section 26(1)(a) provides for the establishment of an ad hoc Bid Evaluation Committee for the evaluation for bids required to be undertaken in accordance with the Procurement Act. Section 26(4) provides that the Bid Evaluation Committee is responsible for the evaluation of pre-qualifications, bids, proposals, or quotations and the preparation of evaluation reports for submissions to the procurement committee as provided under the Procurement Act. It is also further clear from the Procurement Act that the Bid Evaluation Committee is not separate from the public entity, in this case the NAC.



[33] After evaluation of the arguments placed before court, the court finds that the Bid Evaluation Committee does not have a direct and substantial interest in the legal matter and should therefore not be joined.

[34] I therefore make the following orders:

1. The matter is referred to hear oral evidence regarding the issues raised by the applicant in the case management report.
2. The joinder application is dismissed.
3. The respondents who opposed the application for referral to oral evidence are jointly and severally ordered to pay the cost of this application.
4. The second respondent is ordered to pay the costs of the joinder application.
5. The matter is postponed to 16 April 2024 at 15h30 for the determination of a hearing date of the oral evidence.

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E RAKOW  
Judge

APPEARANCES

Applicant:	R Heathcote SC with JP Jones, Instructed by Viljoen & Associates, Windhoek
First respondent:	J Gauntlett SC with AT Hengari Instructed by Shikongo Law Chambers, Windhoek
Second respondent:	S Namandje with J Arnols Of Sisa Namandje & Co. Inc., Windhoek