CASE NO.: A 352/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SHETU TRADING CC **APPLICANT**

and

THE CHAIR OF THE TENDER BOARD OF NAMIBIA **1ST RESPONDENT**

THE MINISTER OF WORKS, TRANSPORT AND COMMUNICATION **2ND RESPONDENT**

VAE PERWAY (PTY) LTD t/a VAE SA **3RD RESPONDENT**

GEORGE SIMATAA, PERMANENT SECRETARY, MINISTRY OF WORKS AND TRANSPORT **4TH RESPONDENT**

CORAM: **NDAUENDAPO, J**

Heard on: 6 April 2011

Delivered on: 4 July 2011

REASONS

NDAUENDAPO, J

By notice of motion, the applicant brought an urgent application seeking the following relief, namely:

"1. Condoning the non-compliance with the Rules of this Honourable Court and hearing this application for the interim relief set out in paragraphs 2 and 3 below on an urgent basis as is envisaged in Rules 6(12) & 13 of the High Court Rules and in particular but not limited to condoning abridgement of the time period stipulated in Rule 6(13)

2. Interdicting the second, third respondent and fourth respondents from taking any further step, including taking delivery of the rails and any other stock or equipment, in furtherance of the award of tender No. F 1/10/-22/2010 NORTHERN RAILWAY EXTENSION PROJECT: RAIL PROCUREMENT (the tender) to third respondent, pending the finalisation of the application, launched on 22 November 2010, reviewing the purported decision by the tender board of Namibia to award the tender to third respondent.

3. Directing that those respondents opposing this application pay the costs thereof jointly and severally, the one paying the other to be absolved, on an attorney and client scale.

4. Granting the applicant such further and or alternative relief as this court deems fit."

When the matter came before me on 6 April 2011, I dismissed the application with costs and reserved my reasons. I now provide my reasons. The applicant was represented

by Ms Angula, Messrs Hinda and Narib appeared for first, second and fourth respondents. Mr Denk appeared for the third respondent.

[2] The parties

Applicant is Shetu Trading cc (2008/4367) a close corporation incorporated in terms of the law of the Republic of Namibia and its principal place of business at 9 Jan Jonker Road, Klein Windhoek. The first respondent is the Chair of the Tender Board of Namibia. The Tender Board is a statutory body established in terms of section 2 of the Tender Board of Namibia Act 16 of 1996 care of the Government Attorney second floor Sanlam Building, Independence Avenue, Windhoek. The second respondent is the Minister of Works and Transport care of the Government Attorney, second floor, Sanlam Building. The third respondent is Vae Perway (Pty) Ltd t/a Vae SA a company incorporated in terms of the laws of South Africa with its principal place of business at 23 Anvil Road, Isando, South Africa and now care of Koep & Partners 33 Schanzen Road, Windhoek.

[3] Background

On or about 29 June 2010 an invitation to tender for the Namibian Northern Railway Extension: rail procurement (under tender number F1/102-4/2008) was advertised by the tender board in the NEW ERA newspaper. Applicant submitted its tender timeously. The third respondent also submitted its tender. On 30 August 2010 the tender was awarded to the third respondent. On 19 November 2010 the applicant launched a review application seeking the following relief;

"1. Reviewing and setting aside the decision by first respondent on 30 August 2010 to award tender no: F1/10/1-22/2010 Northern Railway Extension Project. Rail procurement to third respondent.

2. Referring the matter back to the Tender Board of Namibia to properly evaluate and reconsider the award of the tender, alternatively, to invite new tenders and properly evaluate and consider the award of tenders' submitted.

3. ordering that the first, second and third respondents pay the applicant's costs jointly and severally, the one paying the other to be absolved, alternatively that those respondents opposing the application pay the applicant's costs jointly and severally, the one paying the others to be absolved."

The review application did not seek an interim interdict pending the finalisation of the review application.

[4] The founding affidavit in the urgent application which came before me on 6 April 2011 was deposed to by Anna Mbundu the managing member of the applicant. She states that "the respondents know (sic) since at least 12 November 2010 that the award of the tender is challenged. Already then first and second respondents were requested to undertake that the implementation of the tender would not proceed pending the review application. They did not respond."

[5] "Everything was kept a secret and we could not find any thing out regarding the signing of the agreement until early March 2011 when we heard rumours that the agreement was in the meantime signed. She further states that: "I immediately reported this to Ms Angula. On 24 March 2011 she wrote to Mr Chibwama requesting an undertaking – once again – that no further steps will be taken. He did not respond to date." She further states that: "on 31 March 2011 we read in the New Era that the rails for the project have arrived in Walvisbay and will be transported to the North by TransNamib. "All this was arranged in secret while we attempted to obtain undertakings and the delivery of the record was delayed. I say this is in bad faith and done at the risk of the respondents."

[7] As far as **urgency** is concerned, she states the following:

'I say this matter is urgent by its very nature. The review applicant (sic) was initiated in November 2010. The respondents have known since then that the award is challenged. Repeated enquiries by us about the status of the implementation were met with obfuscation and secrecy. Formal requests were either ignored or not met with "we will get back to you". Delivery of the record was deliberately delayed. Applicant will be severally (sic) prejudiced in presenting its case and may even end up with an empty victory if this delivery of the rails is allowed to continue. This would bring the administration of justice in disrepute and is also a serious blemish on the tender process. I request that the Customs and Excise of the Ministry of finance should not release the rails imported to Namibia, currently in the port of Walvisbay and similarly TransNamib should not transport same from the port pending the outcome of this

application." She further states: "the applicant is entitled to the fair adjudication of a tender it participates in. Therefore allowing this tender to go ahead while applicant disputes its award on solid grounds will deprive it of substantial redress. The setting aside of the award will be meaningless if it occurs after the rails have already been delivered"

[8] **Is the application urgent?**

Both Mr Hinda and Mr Denk submitted that the application is not urgent and if there was any urgency it was self-created. They submitted that the applicant was aware already in September 2010 that the tender was awarded to third respondent and should have brought the application for interim relief when it launched the review application.

Rule 6(12) (b) provides as follows:

> **"In every affidavit or petition filed in support of any application under paragraph (a) of the subrule, the applicant should set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims that he or she would not be afforded substantial redress at a hearing in due course"**

In **Mweb Namibia v Telecom Namibia Ltd** Case No (P) 91/2007 unreported the full bench said the following about urgent applications:

> "Rule 6 (12) (b) makes is 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 redress 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 applicant and that "mere lip service" is not enough. (Luna Meubel

Vervaardigers vs Makin & Another (t/a Makins 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. (In L&B Marow 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.)

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. In L& B Markow Caterers (Pty) Limited vs Greatermans SA Limited & Another supra, page 110H – 211A).

In Twentieth Century Fox Films Corporation and Another vs 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 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-50A0, Maritz, J approved what was said in the cases Twentieth Century Fox Films Cooperatio, 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 throught 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 effected parties for entering appearance to defend and for answering affidavits;. (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 Mukhuva & Others 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."

In Salt and Another v Smith 1991(2) SA at 187 Muller AJ (as he then was) said the following:

"This Rule (6)(12)(b) entails two requirements, namely the circumstance relating to urgency which has to be explicitly set out and, secondly, the reasons why the applicant in this matter could not be afforded substantial redress at a hearing in due course."

[9] Having regard to the principles enunciated in the Mweb and Smith cases, I am not satisfied that a case for urgency has been made out. I say so for the following reasons:

(a) on its own version applicant knew since at least 12 September 2010 that the tender was awarded to the 3rd respondent.

(b) all bidders (including applicant) received the "instruction to bidders" manual and clause 33.2 of that manual provides "The notification of award will constitute the formation of the contract" The contract came into existence upon notification to 3rd respondent on 2 September 2010. The unsuccessful tenderers were given notice of the award in the New Era newspaper on 31 August 2010, on the website of the Ministry of Finance and on the notice board of the Ministry of Finance.

(c) the review application was launched on 19 November 2010 but did not pray for an interim interdict pending the finalization of the review application.

And as Mr Denk submitted, correctly in my view, "that unless the court suspends by way of interim relief the legal consequences of the administrative act in question, such consequences continue unabated". Ms Angula submitted that the respondents knew in November that the award is taken on review and should not have implemental the contract. I disagree with that. There was no court order preventing the respondents from implementing the contract.

(d) In terms of clause 5.2 of the instructions to bidders manual the following is stated:

"5.2 The Bidder is expected to examine all instructions, forms, terms and specifications in the bidding documents." Under the heading schedule of requirements: (6.2) the following is stated: "the delivery schedule specified below

is the absolute maximum period and only delivery schedules sooner from specified below will be accepted.

'Delivery in Ondangwa

1. a minimum of 3000 metric tons within four months of the contract start date
2. a minimum of 2700 metric tons within six months of the contract start date.'

Already in September 2010 the applicant was aware that the tender was awarded to third respondent and must also have been aware that once the contract was awarded the first delivery of the rail must have taken place within 4 months, from the start of the contract and by the time when the review application was launched, applicant should have been aware that the first consignment of rails was already delivered or about to be delivered and should have brought the urgent application then.

[10] The second requirement of Rule 6(12(b) is that the applicant must give reasons why applicant could not be afforded substantial redress at a hearing in due course. No where in the founding affidavit does Ms Mbundu give reasons why the applicant could not be afforded substantial redress at a hearing in due course. In Luna Meubel Vervaardigers (Edms) Bpk v Makin and another (t/a Makin's Furniture Manufacturers) 1977(4) SA 135 (W) at 137 F Coetzee J said"

> "Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down".

[11] In the light of my decision it is not necessary to deal with the other points *in limine* raised by counsel for the respondents nor is it necessary to deal with the merits of the application itself.

[12] In the result, the application by the applicant is dismissed on the grounds that the requirements of the Rule 6(12)(b) have not been met, with costs.

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NDAUENDAPO, J

ON BEHALF OF THE APPLICANT:	**MS ANGULA**
Instructed by:	**LORENTZ ANGULA INC.**
ON BEHALF OF THE 1ST, 2ND & 4TH RESPONDENTS:	**MR HINDA & MR NARIB**
Instructed by:	**GOVERNMENT ATTORNEY**
ON BEHALF OF THE 3RD RESPONDENT:	**MR DENK**
Instructed by:	**KOEP & PARTNERS**