

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

URGENT APPLICATION

Case No.: HC-MD-CIV-MOT-REV-2025/00045

In the matter between:

ETA INVESTMENTS JV ETN TECHNICAL SERVICES

APPLICANT

and

CHAIRPERSON OF THE REVIEW PANEL

FIRST RESPONDENT

MINISTER OF EDUCATION, ARTS AND CULTURE

SECOND RESPONDENT

TSEPO HOLDINGS AND CATERING COMPANY

THIRD RESPONDENT

Neutral citation: *ETA Investments JV ETN Technical Services v Chairperson of the Review Panel* (HC-MD-CIV-MOT-REV-2025/00045) [2025]
NAHCMD 84 (7 March 2025)

Coram: HANS-KAUMBI, AJ

Heard: 25 February 2025

Delivered: 7 March 2025

Flynote: Urgent Applications–Rule 73(4)– Applicant must satisfy the requirements of rule 73 (4) of the rules of court for the matter to be heard on an urgent basis – Lack of funds not sufficient reason for delay particularly where steps taken to obtain funding is not set out – A deponent on behalf of a juristic person must establish authority to act on its behalf in the founding affidavit.

Summary: The applicant launched an urgent application on 25 February 2025 in which the applicant seeks amongst other relief, an order to review and set aside the decision of the first respondent dated 9 December 2024 in respect of bid No. G/RFQ/10-57/2024-2025 for the supply and delivery of food stuff to Government school hostels for the period of 6 months from October to 31 March 2025 LOT 3 Otjozondjupa Region. The urgent application was opposed by the second and third respondents who raised various points in limine. The second respondent raised two points namely; (a) the lack of urgency and (b) that the relief sought by the applicant was incompetent. The third respondent raised five points in limine namely; (a) the lack of authority of the deponent to the founding affidavit (b) locus standi and citation of the applicant to launch such application; (c) inappropriate relief sought by the applicant; (d) that this matter lacks urgency and (e) that no case has been made out for substituted service.

Held: The requirements in terms Rule 73(4) must be complied with and not mere lip service paid thereto. The lack of funds is not a sufficient reason to explain the delay in bringing an urgent application, especially where the steps taken to explain what was done to secure funding, were not set out.

Held further that: Authority to bring an application on behalf of a juristic person should be established in the founding affidavit. Relief shall not be available to an applicant to address the lack of authority in reply where no such authority is established from the onset.

ORDER

1. The urgent application is hereby dismissed; and
2. The deponent, Mr Kamapunga and Mrs Kamapunga, is ordered to pay the costs of the second and third respondents herein.

URGENT APPLICATION JUDGMENT

HANS-KAUMBI, AJ:

Introduction

[1] The applicant approached the court on an urgent basis on 25 February 2025, seeking the following relief:

‘1. Condoning the applicant's non-compliance with the requirements related to forms and service provided for in the Rules of the above Honourable Court and directing that this matter be heard as one of urgency as contemplated in the Rule 73 (3) of the Rules of this honourable court;

2. That the decision by the first respondent dated 9 December 2024 in respect of Bid No. G/RFQ/10-57/2024-2025 for the supply and delivery of foodstuff to government school hostels for the period of six (6) months from 1 October to 31 March 2025 Lot 3: Otjozondjupa.

be reviewed and set aside and declared null and void and of no force and effect.

3. An Order in terms whereof this matter is remitted to the second respondent for the re-evaluation of bids submitted in the procurement under reference number No. G/RFQ/10-57/2024-2025 for the supply and delivery of foodstuff to government school hostels for the supply and delivery of foodstuff to government school hostels for the period of six (6) months from 1 October to 31 march 2025 lot 3: Otjozondjupa region, alternatively, to the first respondent for rehearing.

4. That the decision by the second respondent in its Executive Summary letter dated 25 October 2024, purporting to disqualify the Applicant is hereby reviewed and set aside.

5. An Order in terms whereof the second respondent is interdicted from:

5.1 Implementing the first respondent's order dated 9 December 2024;

5.2 Entering into any procurement contract in respect of Bid No G/RFQ/10-57/2024-2025 for the supply and delivery of foodstuff to government school hostels for the period of six (6) months from 1 October to 31 March 2025 lot 3: Otjozondjupa region. Pending the finalization of the re-evaluation or re-hearing contemplated under Order 3 above.

5.3 Executing the procurement contract in respect of Bid No G/RFQ/10-57/2024-2025 for the supply and delivery of foodstuff to government school hostels for the period of six (6) months from 1 October to 31 March 2025 lot 3: Otjozondjupa region. Pending the finalization of the re-evaluation or re-hearing contemplated under Order 3 above.

6. An order for substituted service for this application to be served by email to the first respondent on Ms Kaino Shigwedha who is the executive assistant to the Chairperson of the review panel at Kaino.Shigwedha@mof.gov.na, and to Ms Christine Mudumbi who is the Executive assistant to the Minister of Education, Arts and Culture at Christine.Mudumbi@moe.gov.na, and to info@tsepo.net, being the email address of the managing director of the Third respondent.

7. An order in terms whereof the Respondents electing to oppose this application are (jointly and severally, the one paying the others to be absolved) directed to pay the costs of this application, such costs being the costs of one legal practitioner.'

The Parties

[2] The applicant is referred to as ETA Investments JV ETN Technical Services, with its primary place of business at Erf 88, John Tjikua Street, Okakarara, Republic of Namibia.

[3] The first respondent is the Chairperson of the Tender Review Panel. The first respondent's address of service is in the care of the office of the Government Attorney, situated at the 2nd floor, Sanlam Centre, Independence Avenue, Windhoek, Republic of Namibia.

[4] The second respondent is the Minister of Education, Arts and Culture, with its primary place of business at Government Office Park, Windhoek, Republic of Namibia and further address of service is in the care of the office of the Government

Attorney, situated on the 2nd floor, Sanlam Centre, Independence Avenue. Windhoek, Republic of Namibia.

[5] The third respondent is Tsepo Holdings and Catering Company.

The Background

[6] The applicant submitted a bid for the supply and delivery of foodstuff to government school hostels, for the period 1 October 2024 until 31 March 2025, prior to the closing date which was 29 July 2024. The application was submitted under bid no. G/RFQ/10-57/2024-2025 to the first respondent. On 25 October 2024, the second respondent made an award to 9 companies ranging from Lot 1 to Lot 9, in various regions. An executive summary was further issued by the second respondent setting out the companies that were non-responsive and the reasons thereof.

[7] The executive summary also informed the unsuccessful bidders that, in the absence of any application for reconsideration within 7 days, referred to as a standstill period, from the date of receipt of the notice, the award shall be made. The standstill period referred to, ended on 5 November 2024. On 5 November 2024, the applicant submitted an application for reconsideration. On 6 November 2024, the first respondent responded to the applicant on the basis that the application for reconsideration does not contain 'grounds for consideration'. On 7 November 2024, the applicant responded to the first respondent's correspondence in which it stipulated that the grounds of reconsideration were expressly set out in paragraph 6 to 9 of the affidavit.

[8] On 15 November 2024, the applicant brought a review application to the tender review panel to review, cancel and set aside the first respondent's decision dated 25 October 2024.

[9] On 9 December 2024, the Tender Review Panel made a finding that the applicant in relation to Lot 3, Otjozondjupa Region, failed to submit a valid fitness certificate in relation to the storage facilities. On 10 January 2025 the applicant was

advised of the decision of the Tender Review Panel not to award the tender to the applicant.

[10] On 17 February 2025, the applicant filed this urgent application with the Court to review the decision of the Tender Review Panel and the matter was set down for 25 February 2025.

Points in limine

Urgency

[11] The second and third respondents raised several points in limine and I shall start with urgency, as this point was raised by both respondents. The respondents raised lack of urgency on the basis that the applicant failed to comply with Rule 73(4) in that, it failed to set out the grounds that rendered the matter urgent as well as the reasons why it claims that it would not be afforded substantial address at a hearing in due course. The respondents further averred that the applicant was advised of the decision by the Tender Review Panel on 10 January 2025, but only brought the urgent application on 17 February 2025 and the matter was only set down on 25 February 2025. Thus, they contend that it took the applicant 35 days to bring the application and no reasons for the delay in bringing the application is proffered, save for the fact that the deponent in the founding affidavit avers that he was out of pocket and only secured funds on February 2025. The respondents further averred that the applicant did not take the court in its confidence and failed to indicate what steps it took to secure funding.

[12] The third respondent relied on the case of *Du Plessis v Wits Health Consortium (Pty) Ltd*¹ where it was held that;

[16] It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining “when” not only

¹ *Du Plessis v Wits Health Consortium (Pty) Ltd* (JS 122/2011) [2012] ZALCJHB 53 (14 June 2012).

that he or she finally raised funds to conduct the case but also how and when did he or she raise those funds...'

[13] Counsel for the applicant responded that, he surely has a mountain to climb in respect of urgency, yet he stated that it is a mountain that can be climbed. A very optimistic approach seeing that non-compliance with this rule renders the application defunct. He conceded that, he did not provide reasons other than the lack of funds and stated that he could not take it any further than that. He did in his heads indicate that no substantial redress would be available to the applicant at a hearing in due course because the tender review panel were set to make a decision 30 days from the date of their decision. It must be mentioned at this stage that, neither of the parties addressed the court on whether the decision has been made seeing that more than 30 days, i.e., since 10 January 2025, had already passed by the time the urgent application was heard on 25 February 2025.

Lack of Authority

[14] The deponent to the founding affidavit, Mr Gad Kamapunga, states as follows in paragraph 1.3 of the founding affidavit:

' 1.3. I am duly authorized to institute this review application under section 59(1) of the Public Procurement Act, Act 15 of 2015 as amended read with Regulation 42 and to depose to this affidavit on behalf of the applicant.'

[15] Mr Kamapunga established authority to bring a review application to the Review Panel, a statutory body established under the Procurement Act 15 of 2015, however fails to state that he is authorized to bring this urgent application in this forum in the founding affidavit. Thus, counsel contended that, Mr. Kamapunga claims authority not to bring this urgent application in the High Court but refers to his authority in respect of the reconsideration that was brought in front of the Tender Review Panel. An applicant must make out its case in its founding affidavit and the applicant's founding affidavit fails to establish the necessary authority to bring this application. Counsel for the third respondent rightfully claims that this is fatal to the current application.

[16] Counsel further questioned who the applicant was, since the applicant is cited as follows at paragraph 1 of its founding affidavit:

‘The applicant is ETA INVESTMENTS JV ETN TECHNICAL SERVICES with its primary place of business at Erf 88, John Tjikua Street, Okakarara, Namibia.’

[17] The deponent on behalf of the third respondent, Mr Rafael Paulino, avers that the acronym JV in the citation of the applicant led to the assumption that it was a Joint Venture between ETA Investments and ETN Technical Services. He further stated that Counsel for the third respondent, did a BIPA search which revealed that the applicant was in fact 2 close corporations, namely ETA Investments CC and ETN Technical Services CC, with one member each namely, Mrs Grace Kamapunga and Mr Erastus Tuhafeni Nauyoma, respectively, and that the said Mr Gad Kamapunga, the deponent of the founding affidavit of the applicant, was not one of the members, despite claiming that he was a managing member of the applicant.

[18] It also came to light that in the application for reconsideration attached as Annexure GK3 to this application, another person claims to be the managing member of the Joint Venture namely, Mr Hosea Alweendo.

[19] Mr Kamapunga, in retaliation to the third respondent’s attack on his authority to bring this application, filed a replying affidavit in an attempt to cure this defect and attached a resolution by the sole member of ETA purportedly authorizing him to act on behalf of the Joint Venture. A confirmatory affidavit by Mrs. Grace Kamapunga was also filed in an attempt to remedy this situation, in which affidavit she fails to establish that she is authorized to appoint Mr Kamapunga to act on behalf of the joint venture. This however, is complicated by the fact that only one party to the joint venture signed the resolution leaving the question whether the other half of the joint venture is in fact aware of this application. This resolution is defective and if one has regard to the case of *Health Defence League “HDL” v The Minister of Health and Social Services of the Republic of Namibia*,² this Court cannot turn a blind eye to this defect as it would lead to a travesty of justice.

² *Health Defence League “HDL” v The Minister of Health and Social Services of the Republic of Namibia* (HC MD -CIV -MOT-GEN- 2022/00389) [2024 NHCMD 345 (26 June 2024)].

[20] Counsel for the applicant further stated in argument that, authority is a factual question as opposed to locus standi which is a legal question hence he opined that, if authority is challenged, he can set it out in reply. He referred to the case of *Bank Windhoek vs Querrida's Trading Enterprises*³, where it was held that one merely has to allege that one is duly authorized in the founding papers and if authority is then disputed, a resolution may be provided as proof in reply.

[21] Counsel for the third respondent replied to this feeble attempt by Mr. Kamapunga, by stating that the lack of authority cannot be addressed in reply where no such authority is claimed in the founding papers and referred the court to the case of *Standard Bank vs Nekwaya*⁴, where it was held that, an applicant who brings proceedings on behalf of a juristic person must state in the founding papers that he or she is authorized to bring such an application, failing which the court will conclude that the proceedings were not properly authorized.

[22] In the *Health Defence League Case*⁵, Angula DJP(as he was then) held that:

'[54] It is well established law that a juristic person bears the onus to prove that the proceedings have been duly authorised and that the person who brings the application on behalf of the juristic person is authorised to do so.⁶ Such representative must prove that he or she has been duly authorised to represent the juristic person by a resolution of the governing body of such juristic person which was adopted at a duly convened and constituted meeting.'

[23] It was contended by counsel for the third respondent that there was no proper resolution to consider before this court and he surmised that there is nothing in the founding affidavit indicating that all the members of the joint venture were aware of this urgent application being brought on behalf of the joint venture in the High Court of Namibia nor that they authorized same.

[24] Counsel for the third respondent stated that, in order for the applicant to be allowed to file the resolution in reply, the trigger event is that authority to bring the application must have been established in the founding affidavit. That is not the case

³ *Bank Windhoek vs Querrida's Trading Enterprises* (HC-MD-CIV-ACT-CON-2022/02199) [2022] NAHCMD 511 (29 September 2022).

⁴ *Standard Bank vs Nekwaya* (HC-MD-CIV-MOT-GEN -2020/00089) [2020] NAHCMD 122 (26 March 2020).

⁵ *Supra*.

⁶ *National Union of Namibia Workers v Naholo* 2006 (2) NR 659 (HC) paras 22-23.

at present, as the authority claimed in the founding affidavit relates to the review application to the Tender Review Panel and not the current application before this Court.

[25] Based on the facts above, I find no reason to deviate from the position adopted by Judge Masuku in the *Standard Bank v Nekwaya*⁷ matter and accordingly, find that the deponent did not have the authority to bring this application on behalf of the joint venture. This Court can thus not have regard to any other issue raised by the parties herein once it established that authority to bring this application is lacking.

[26] Costs should follow the suit however, in this case it is difficult to award costs against an applicant that might not even be aware of this application hence, it is only just, to award costs against the deponent who lacked authority to bring this application and against Mrs Kamapunga who provided this court with a defective resolution.

[27] I, accordingly make the following order,

1. The urgent application is hereby dismissed; and
2. The deponent, Mr Kamapunga and Mrs Kamapunga, is ordered to pay the costs of the second and third respondents herein.

⁷ Supra.

AN HANS-KAUMBI
Acting Judge

APPEARANCES

APPLICANT

N Halweendo
Of Nafimane Halweendo Legal Practitioners

SECOND RESPONDENT:

T Tjingairi Kaurivi
Of TK Kaurivi Legal Practitioners

THIRD RESPONDENT:

S Ellis
Of Ellis & Partners Legal Practitioners