

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO: HC-MD-CIV-MOT-REV-2023/00426

In the matter between:

AFRICURE PHARMACEUTICAL NAMIBIA (PTY) LTD

APPLICANT

and

COSPHARM INVESTMENT (PTY) LTD

1ST RESPONDENT

CENTRAL PROCUREMENT BOARD OF NAMIBIA

2ND RESPONDENT

MINISTER OF HEALTH & SOCIAL SERVICES

3RD RESPONDENT

NAMPHARM

4TH RESPONDENT

ERONGOMED HEALTH DISTRIBUTORS (PTY)

5TH RESPONDENT

GENMED (PTY) LTD

6TH RESPONDENT

SUPREMO PHARMACEUTICALS (PTY) LTD

7TH RESPONDENT

MOZART MEDICAL SUPPLIERS (PTY) LTD

8TH RESPONDENT

CIRON DRUGS & PHARMACEUTICALS (PTY) LTD

9TH RESPONDENT

GEKA-PHARMA (PTY) LTD

10TH RESPONDENT

ELEMENT MEDICAL SUPPLIERS (PTY) LTD

11TH RESPONDENT

ECONO INVESTMENTS (PTY) LTD

12TH RESPONDENT

AFRIPHARM INVESTMENTS (PTY) LTD

13TH RESPONDENT

WAP PHARMACARE T/A WAP MEDICAL SUPPLIERS	14TH RESPONDENT
BROAD PHARMA (PTY) LTD	15TH RESPONDENT
CORANCE INVESTMENTS (PTY) LTD JV	
TRANSPHARM	16TH RESPONDENT
TALIINDJE INVESTMENT CC	17TH RESPONDENT
SALUTEM MEDICALS (PTY) LTD	18TH RESPONDENT
HOODIA PHARMA (PTY) LTD JV	
GALEN SUPPLIES CC	19TH RESPONDENT
CAREMARQUE PHARMA CC	20TH RESPONDENT
OSHAKATI PHARMACY CC T/A MEDEX PHARMA	21ST RESPONDENT
SHIPANGA MEDICAL SERVICES (PTY) LTD	22ND RESPONDENT
INNOVA HEALTHCARE DISTRIBUTORS & WAREHOUSE (PTY) LTD	23RD RESPONDENT
LANDULAMED WHOLESALER & DISTRIBUTORS CC	24TH RESPONDENT
PFIZER LABORATORIES (PTY) LTD	25TH RESPONDENT
WINDHOEK MEDICAL SOLUTIONS (PTY) LTD	26TH RESPONDENT
CHAIRPERSON OF THE REVIEW PANEL	27TH RESPONDENT
THE REVIEW PANEL	28TH RESPONDENT
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA	29TH RESPONDENT

Neutral Citation: *Africure Pharmaceutical Namibia (Pty) Ltd v Cospharm Investment (Pty) Ltd* (HC-MD-CIV-MOT-REV-2023/00426) [2023] NAHCMD 679 (25 October 2023)

Coram: UEITELE J
Heard: 04 October 2023
Delivered: 25 October 2023

Flynote: Applications and motions — Urgency — High Court Rule 73(4) — Provisions peremptory — Interim interdict — Requirements are well established.

Summary: On 29 April 2022, the Board by publication in the local printed and electronic media invited bids for the supply of pharmaceutical products. The tender closed on 08 November 2022. On 26 April 2023, the Board issued a notice of selection of procurement award to the bidders. In the 26 April 2023 notice, the applicant was notified that it was selected to provide about N\$123 million worth of pharmaceutical goods/products. Cospharm, the first respondent, also submitted a bid, but its bid was unsuccessful and was found to be unresponsive. Cospharm was aggrieved by the disqualification of its bid and it filed an application in terms of s 55(4A) of the Act to the Board for reconsideration of the notice of selection of procurement award of 26 April 2023.

On 3 August 2023, the Board issued a new notice of selection of procurement award in terms of which Cospharm was issued with a notice of award worth N\$1,3 billion and the applicant's award was reduced from N\$123 million to N\$45 million. Aggrieved by the notice for selection for award of 3 August 2023, the applicant, in terms of s 59 of the Act, filed a review application with the Review Panel in terms of which it challenged the 3 August 2023 award on several review grounds. Despite the applicant's review application, filed on 11 August 2023, that was pending before the Review Panel, the Board on 16 August 2023 issued procurement contract acceptance letters to all successful bidders identified in the 3 August 2023 notice of procurement award, in which the successful bidders were requested to provide performance security worth ten percent of the contract value, within 30 days, failing which, the Board would select another bidder.

On 21 August 2023, the applicant launched an urgent application in terms of which it sought an order restraining and interdicting the Board and Cospharm from implementing or executing any procurement contract awarded by the Board in respect of Tender Number: G/OIB.CPBN01/2022 pending the outcome of the applicant's review application

lodged on 11 August 2023 with the Review Panel. This Court granted the order sought by the applicant.

On 28 August 2023 the Review Panel heard the applicant's review application and on 29 August 2023 dismissed the applicant's review application and again confirmed the Board's decision of 3 August 2023. Aggrieved by the Review Panel's decision to dismiss its review application the applicant instituted this application.

Held that, rule 73(4) sets out the requirements which a party must satisfy in order for a matter to be heard on an urgent basis. In the present matter time is of the essence. If the dispute between the parties is not resolved prior to the implementation and completion of the bid, the outcome of the dispute, when it comes to the available remedies could be potentially affected and leave the applicant with a hollow victory.

Held further that, the applicant has no suitable alternative remedy in order to remedy the conduct giving rise to the harm and that the applicant has accordingly made out a case for the interim relief sought.

Held that, the general rule is that costs must follow the result. Nothing emerges from this matter warranting a deviation from this principle.

ORDER

1. The applicant's non-compliance with the forms and service provided by the Rules of this Court is condoned and that the matter is heard as one of urgency as contemplated by Rule 73(3).

2. The second respondent, the Central Procurement Board, and all the successful bidders in terms of the notice of selection for award dated 3 August 2023 are hereby restrained and interdicted from implementing or executing any procurement contract awarded by the Second Respondent, in respect of Tender Number: **G/OIB/CPBN01/2022**, and directed to be implemented by the Review Panel pending the outcome of this review application.

3. The second respondent, the Central Procurement Board and the Review Panel must by not later than 15 November 2023, serve on the applicant a copy of the complete record and file with the registrar the original record of such proceedings sought to be corrected or set aside together with reasons for the decision and to notify the applicant that he or she has done so.

4. The second and twenty-eighth respondents must serve on the applicant a copy of the complete record and file with the registrar the original record of the proceedings sought to be corrected or set aside together with reasons for the decision and must, by not later than 15 November 2023, notify the applicant that they have done so.

5. The applicant must, if so advised, by not later than 27 November 2023 by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its application and supplement the supporting affidavit.

6. A respondent who intends to oppose the applicant's application must file its answering affidavit to the applicant's supplemented founding affidavit by not later than 15 December 2023.

7. The applicant must if so advised, file its replying affidavit to the respondents' answering affidavits by not later than 22 December 2023.

8. The matter is postponed to 16 January 2024 at 08:30 for a case management conference.

9. The parties must file a joint case management report by not later than Friday 12 January 2024.

10. The applicant must file its heads of argument on or before 17 January 2024 and the respondents must file their heads of argument on or before 24 January 2024.

11. The matter is postponed to 31 January 2024 at 10:00 for hearing part B of the Review Application.

12. The respondents who opposed the application must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs, such costs to include the cost of one instructing and one instructed counsel.

RULING

UEITELE J:

Introduction

[1] On 25 September 2023, Africure Pharmaceutical Namibia (Pty) Ltd, (I will, in this ruling, for ease of reference, refer to this company as the applicant), by notice of motion commenced proceedings on an urgent basis against 29 respondents. The applicant's application consists of two components namely, part A and part B. In part A the applicant seeks, apart from the prayer for costs, an order condoning its non-compliance with the rules of this court and to have the matter heard on an urgent basis as envisaged under rule 73 (4) of the High Court Rules; and an interim order interdicting and restraining the Central Procurement Board (which is cited as the second respondent) and all the successful bidders in terms of the notice of selection for award dated 3 August 2023 from

implementing or executing any procurement contract awarded by the Central Procurement Board, in respect of *Tender Number: G/OIB/CPBN01/2022* pending the review in part B of the notice of motion.

[2] In part B the applicant seeks an order reviewing and setting aside the decision of the Central Procurement Board dated 3 August 2023 awarding the bid in respect of *Tender Number: G/OIB/CPBN01/2022* to Cospharm pursuant to a reconsideration application lodged by Cospharm. The applicant furthermore seeks an order reviewing and setting aside the decision and order by the Review Panel dated 29 August 2023 (but served on the Applicant on 15 September 2023) dismissing the review application lodged by the applicant. The applicant furthermore seeks an order directing the Central Procurement Board to act in terms of s 55(5) of the Public Procurement Act, No. 15 of 2015 (the Act) and award contracts to the successful bidders in terms of the first Notice for Selection of Procurement Award dated 26 April 2023.

[3] In part B, the applicant furthermore claims an alternative relief, namely, that s 55 (4A) of the Act, to the extent that that provision seeks to deny a selected bidder an opportunity to make representations to a Public Entity or the Central Procurement Board, in relation to a reconsideration application lodged by a bidder challenging that bidder's selection or non-selection, violates Article 18 of the Namibian Constitution and is as such unconstitutional.

[4] As I have indicated earlier in this ruling the applicant cited 29 respondents in this matter, however, the major role players are the first respondent, Cospharm Investment (Pty) Ltd, the second respondent, the Central Procurement Board of Namibia, the third respondent the Minister of Health & Social Services, the twenty eighth respondent the Review Panel established in terms of s 58 of the Act and the twenty ninth respondent who is Attorney General of the Republic of Namibia. I will for the sake of convenience and ease of reference refer to the first respondent simply as Cospharm, the second respondent as the Board, the third respondent as the Minister, the twenty eighth respondent as the Review Panel and the twenty ninth respondent as the Attorney

General. Where it becomes necessary to refer to any other respondent I will refer to that respondent by his, her or its name.

[5] The background facts which gave rise to the applicant approaching this Court are to a large extent not in dispute. The factual background facts are these.

Background

[6] On 29 April 2022, the Board by publication in the local printed and electronic media invited bids under procurement number G/OIB/CPBN01/2022 (for the supply of pharmaceutical products). The tender closed on 08 November 2022. On 26 April 2023, the Board issued a notice of selection of procurement award to the bidders. In the 26 April 2023 notice the applicant was notified that it was selected to provide about N\$123 million worth of pharmaceutical goods/products. Cospharm also submitted a bid, but its bid was unsuccessful and was found to be unresponsive.

[7] Cospharm was aggrieved by the disqualification of its bid and it therefore on 02 May 2023, filed an application in terms of s 55(4A) of the Act to the Board for a reconsideration of the notice of selection of procurement award of 26 April 2023. It is not in dispute that Cospharm did not serve its application for reconsideration on any of the bidders who were informed on 26 April 2023 that they were selected to provide pharmaceutical products in terms of tender G/OIB/CPBN01/2022. It furthermore appears that the Board reconsidered Cospharm's bid and took a decision in respect of that application for reconsideration on 9 May 2023 but only communicated its decision to Cospharm on 26 May 2023.

[8] Section 55(4A) requires the Board to, within seven days from the date of receipt of the application, notify the bidder of its decision. As indicated in the preceding paragraph, the Board failed to notify Cospharm of its decision within the seven days stipulated in s 55(4A). As a result of the Board's failure Cospharm on 24 May 2023 lodged a review application with the Review Panel. As I indicated in the preceding paragraph the Board

notified Cospharm of its decision with respect to Cospharm's application for reconsideration on 26 May 2023. In addition to notifying Cospharm of its decision, the Board directed the Bid Evaluation Committee to re-evaluate Cospharm's bid.

[9] After learning that its reconsideration application was favourably reconsidered, Cospharm, on 06 June 2023, withdrew its application for review from the Review Panel. On that same date the applicant, after becoming aware that Cospharm has withdrawn its review application that was filed with the Review Panel, addressed a letter to the chairperson of the Board. The essence of the applicant's letter was to convey to the Board that the period within which the Board was empowered to reconsider an award had in terms s 55 (4A) of the Act, lapsed. In the letter, the applicant further made allegations that the Board's decision to reconsider Cospharm's application was *ultra vires* the Act. On 8 June 2023, Cospharm's legal representatives responded to the applicant's letter of 6 June 2023 which was addressed to the Board. In its letter Cospharm, contended that there was no prohibition in law or bar against the Board from taking a decision after the seven days prescribed period has lapsed.

[10] The Board itself only replied to the applicant's letter of 6 June 2023 on 12 June 2023. In its letter the Board stated that it had already adjudicated upon Cospharm's reconsideration application on 9 May 2023 and a resolution was taken on the same day. The second respondent further pointed out in its letter that it was not correct that it had considered the reconsideration application beyond the seven day standstill period that ended on 11 May 2023, but admitted that due to some oversight it only communicated its decision to Cospharm on 26 May 2023. The applicant and the Board continued to exchange correspondence with respect to the propriety or validity of communicating the Board's decision outside the seven days stipulated in s 55(4A).

[11] It appears that sometime during June 2023 Taliindje Investment CC lodged an application for the reconsideration of its bid. It further appears that Taliindje's reconsideration application was unsuccessful and thereafter Taliindje applied for the review of the Board's decision to the Review Panel in terms of which it challenged the

Board's decision to award the bids as communicated to the bidders on 26 April 2023. The Review Panel heard Taliindje Investments CC's application on 6 July 2023 and on 17 July 2023 dismissed Taliindje Investments CC's review application. The Review Panel furthermore confirmed the validity of the awards as communicated by the Board on 26 April 2023.

[12] On 3 August 2023, the Board issued a new notice of selection of procurement award in terms of which Cospharm was issued with a notice of award worth N\$1,3 billion and the applicant's award was reduced from N\$123 million to N\$45 million. Aggrieved by the notice for selection for award of 3 August 2023 the applicant, in terms of s 59 of the Act, on 11 August 2023 filed a review application with the Review Panel in terms of which it challenged the 3 August 2023 award on several review grounds. Despite the applicant's review application, filed on 11 August 2023, that was pending before the Review Panel, the Board on 16 August 2023 issued procurement contract acceptance letters to all successful bidders identified in the 3 August 2023 notice of procurement award, in which the successful bidders were requested to provide performance security worth ten percent of the contract value, within 30 days, failing which, the Board would select another bidder. The letter of 16 August 2023 further states that 'pending the signature of the contract agreement, this letter of acceptance, employer's requirement and your submitted bid offer, shall constitute the establishment of the contract'.

[13] On 21 August 2023, the applicant launched an urgent application in terms of which it sought an order restraining and interdicting the Board and Cospharm from implementing or executing any procurement contract awarded by the Board in respect of Tender Number: G/OIB.CPBN01/2022 pending the outcome of the applicant's review application lodged on 11 August 2023 with the Review Panel. This Court granted the order sought by the applicant¹.

¹ See *Afrisure Pharmaceutical Namibia (Pty) Ltd v Cospharm Investment (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2023/00374) [2023] NAHCMD 578 (19 September 2023).

[14] On 28 August 2023 the Review Panel heard the applicant's review application and on 29 August 2023 dismissed the applicant's review application and again confirmed the Board's decision of 3 August 2023. Aggrieved by the Review Panel's decision to dismiss its review application the applicant instituted this application.

[15] Cospharm, the Board, the Review Panel and the Attorney General opposed the application, in particular part A of the application. (I will where I make reference to all the opposing respondents refer to them as the respondents). Both Cospharm and the Board took issues with the urgency of the matter. They contended that the applicant has not explained why it took it more than ten days to launch this application, they accordingly argued that the matter is not urgent and any urgency was self-created. I will shortly return to this aspect.

The basis on which the applicant relies for the relief it seeks

[16] The applicant seeks to have the Board's decision reviewed and set aside on basically three bases. The first basis is that the Board failed to observe the *audi alteram partem* rule and thus failed to ensure that the applicant was procedurally fairly treated as required under Article 18 of the Constitution. The second basis is the applicant's contention that the purported decision taken and communicated by the Board outside the prescribed standstill period of 7 days is a nullity and the third basis is the applicant's contention that the Board ignored its own order made in respect of the review application that was filed by Taliindje Investment CC.

[17] The respondents, in addition to the contention by the Board, the Attorney General and the Review Panel that the application is not urgent, argue that the applicant has failed to satisfy the requirements for an interim interdict. I will therefore in the next paragraphs discuss the question of whether or not the matter is urgent and set out the requirements for interim interdicts.

Urgency

[18] Rule 73(4) sets out the requirements which a party must satisfy in order for a matter to be heard on an urgent basis. The requirements are now well established and are that the applicant must set out explicitly the circumstances which he or she avers render the matter urgent; and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.

[19] The applicant states that, the Board on 16 August 2023 issued out a letter, the procurement acceptance letter, after the Board had given notice of the procurement award on 3 August 2023 in respect of bid no: **G/OIB/CPBN-01/2022**. The procurement acceptance letter of 16 August 2023 communicates three crucial issues namely that all the successful bidders must provide a performance security within thirty (30) days from the date of the letter (the due date was 25 September 2023) and that the successful bidders must sign a written agreement with the Board within (30) days' of the notice of procurement award, (the due date was 05 October 2023).

[20] The applicant further states that the 16 August 2023 letter made it clear that if a successful bidder failed to provide the performance security or sign the written agreement within the time stipulated in the notice of procurement award of 3 August 2023 of the procurement acceptance letter of 16 August 2023 the award to that bidder would be withdrawn and awarded to the next best bidder. The applicant thus contended that it had no option but to, on an urgent basis, approach court for a declaration that the notice of the procurement award of 3 August 2023 was invalid.

[21] The applicant further outlined the steps that it took once it became aware that the Review Panel had dismissed its review application. The applicant deposed that the Review Panel's decision dismissing its review application was only served on it by 15 September 2023. The applicant outlined that between 16 September and 20 September 2023 it consulted with its legal practitioners and prepared this application which it launched on 22 September 2023.

[22] As regard the availability of a remedy in due course, the applicant contended that in the event that the tender is implemented the applicant will not obtain substantial redress at a hearing in due course. It contended that once pharmaceuticals are supplied the applicant would not be able to supply such pharmaceuticals and would not be able in any event to claim damages because of the legal position that exists in public procurement proceedings.

[23] In *Bergmann v Commercial Bank of Namibia Ltd*² this court held that the Court's power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one. One of the circumstances under which a Court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either *mala fides* or through his or her culpable remissness or inaction.

[24] In the present matter time is of the essence. If the dispute between the parties is not resolved prior to the implementation and completion of the bid, the outcome of the dispute, when it comes to the available remedies could be potentially affected and leave the applicant with a hollow victory. It is furthermore not correct to, as the Board attempted to do, count the days from the day that the Board took a decision and then argue that the applicant should have brought the application within ten or fifteen days of the Board having taken the decision or delayed in bringing this review application. The question is as was stated in *Bergmann* whether the applicant was culpably remiss or took no action. This court stated that in our law there is no delay rule³.

[25] I am not persuaded that the applicant has created the urgency either *mala fides* or through culpable remissness or inaction. What is clear on the facts of this matter is that as soon as the applicant was informed of the Board's decision on 15 September 2023 it

² *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 (HC).

³ *Shetu Trading CC v Chair of Tender Board for Namibia and Others* (1) (APPEAL 352 of 2010) [2011] NAHC 179 (22 June 2011).

put in motion the process of challenging the Board's decision. I am therefore satisfied that the matter is urgent and I condone the applicant's non-compliance with the rules of court in so far as it relates to the form and time of serving the pleadings and I hear the matter on an urgent basis.

Interim interdicts

[26] An interim interdict is a court order preserving or restoring the *status quo* pending the determination of the rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination⁴. In this regard the South African Constitutional Court said the following:

'An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination. The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo.'⁵

[27] The requirements for an interim interdict are well known and well established that I hardly need to cite any authority for those requirements which the applicant has to establish in order to obtain the interim interdictory relief it seeks. First there must be a *prima facie* right on the part of the applicant to the relief sought. Second, there must be a well-grounded apprehension of irreparable harm if the interim relief is not granted. Third, the balance of convenience must favour the granting of interim relief. The prejudice to be suffered by the applicants, if the relief is not granted, is to be weighed against the

⁴ See *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC at para [49].

⁵ *Ibid.*

prejudice to be suffered by the respondents, if the relief is granted. The stronger the applicants' *prima facie* right, the less the need to rely on prejudice to themselves and the converse is also true. Fourth, there must be no other ordinary remedy that is available to give adequate redress to the applicant.

Prima facie right

[28] The degree of proof required to establish a *prima facie* right is less exacting than in the case of a final interdict. It is usually recognised that the applicant must prove a right which, though *prima facie* established, is open to some doubt. Counsel for the applicant submitted that the question of whether or not the applicant has established a *prima facie* right or not must be considered in the light of the following facts:

(a) On 26 April 2023 the applicant received a notice of selection for award and executive summary from the Board. In the notice of award the applicant was selected to supply pharmaceutical products worth approximately N\$123 million.

(b) On 3 August 2023 the applicant received a notice of procurement award and executive summary from the Board that materially differed with the 26 April 2023 notice of selection. In the 3 August 2023 notice of selection for award the applicant was informed that it was selected to supply pharmaceutical products worth approximately N\$45 million. This amounts to a reduction of N\$80 Million.

(c) The applicant contends that it was never forewarned about the possibility of the reduction of what it had to supply nor given an opportunity to be heard as to why the award to it was reduced (the Board does not dispute this it instead maintains that the applicant has no right to be forewarned or consulted about the possible reduction of the award).

Counsel for the applicant thus submitted that the applicant upon being informed that it was selected for an award to supply pharmaceutical products acquired some rights and

a legitimate expectation that the right to supply the pharmaceutical goods will not be taken away without following a fair process.

[29] Counsel for the Board on the other hand argued that s 55(4A) of the Act did not confer any right on the applicant to be informed or heard when a bidder invokes that section [that is, s 55(4A)] and request a reconsideration of the award. Counsel thus argued that the applicant had no right to *audi* in those circumstances. Counsel for Cospharm relied on the South African Constitutional Court matter of *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*⁶ and argued that the right to fair administrative action conferred by Art 18 of the Constitution is not peculiar to the applicant and is therefore not the type of right which is accorded the court's protection. The Constitutional Court stated that:

[48] At the outset the high court had to decide whether the applicants had established a prima facie right, although open to some doubt. It examined the grounds of review and was persuaded that they bore prospects of success and that therefore the applicants had established a prima facie right to have the decisions reviewed and set aside. Two comments are warranted. First, we heard full argument on the merits on the grounds of review. I am unable to say without more that they bear any prospects of success. That decision I leave to the review court.

[49] Second, there is a conceptual difficulty with the High Court's holding that the applicants have shown 'a prima facie right to have the decision reviewed and set aside as formulated in prayers 1 and 2'. The right to approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that '(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair' and in turn PAJA regulates the review of administrative action.

[50] Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside

⁶ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.⁷

[30] As I indicated earlier in this ruling, the question of whether or not the applicant has the right to be heard before a decision affecting it is taken is a matter to be decided by the trial Court or, in this case the review court hearing the main application and not by the Court hearing an interlocutory matter. I hold the view that this court has, no right to fetter the discretion of the trial or the review Court. Despite that view I find the argument by counsel for the Board that s 55(4A) does not confer a right to be heard or informed on the bidder during the reconsideration stage, to be unconvincing.

[31] I say counsel's argument is unconvincing for the following reasons. Article 18 of the Constitution imposes a duty on administrative bodies and administrative officials to give effect to lawful, reasonable and procedurally fair administrative action. This requirement must be fulfilled where, the action or decision of an administrative body or official has the potential to adversely affect the rights of an individual. It also gives a right to reasons for such decision. Conduct by an administrative body or official that has the capacity to adversely affect the rights of an individual can be equated to administrative action. Article 1(6) of Constitution provides that the Constitution is the Supreme law of Namibia and any conduct that infringes the legal rights entrenched in the Constitution is invalid. I therefore hold that the right to be heard is conferred and protected by the Constitution.

[32] I hold the view that the case of *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* does not assist the respondents. I say so for the reason that in the present matter the applicant does not only allege the existence of a right to approach a court in order to review an administrative decision. The applicant's contention is that once it was informed that it was, in terms of the tender, selected to supply the

⁷ *Ibid.* I have omitted the footnotes.

pharmaceutical products, it acquired certain rights, for example the right to supply the pharmaceutical products identified in the award. Its claim is that the rights that it so acquired cannot just be taken away without following a fair procedure, which encompasses the right to be heard. This court has accepted that administrative action which materially and adversely affects the rights or legitimate expectation of any person in a manner that has a direct and external legal effect must be procedurally fair⁸.

[33] There is therefore no merit whatsoever in counsel for the Board's argument that the applicant would have the opportunity to be heard in the review proceedings before the Review Panel. I am satisfied that the right which the applicant seeks to protect is a right to which, if not protected by an interdict, irreparable harm would ensue and that it has thus established (even if it is open to doubt) a prima facie right.

A well-grounded apprehension of irreparable harm if the interim relief is not granted

[34] In the founding affidavit the applicant contends that, until its right not to be unlawfully and unfairly treated is determined, it runs the risk of not having an effective remedy if it does not interdict the implementation of the 3 August 2023 award. To this extent the applicant relied on the decision of the Supreme Court in *Chico/Octagon Joint Venture v Roads Authority and Others*⁹ where the Supreme Court stated that:

'Thirdly, the fact that work started on the project was not the fault of third respondent. Appellant criticizes the third respondent for continuing with the project in the face of the review application and appeal and submits this means that it took this risk and must thus live with the consequences. I disagree. Appellant was well aware of the fact that it could seek protection in this regard by obtaining an interim interdict. This relief, was however, abandoned without any undertaking by any of the respondents not to implement the award. Third respondent had entered into a multimillion dollar contract and had to perform in terms thereof or face consequences which

⁸ See *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC) and *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 174.

⁹ *Chico/Octagon Joint Venture v Roads Authority and Others* [2017] NASC 34 (21 August 2017). I have omitted references to footnotes.

could potentially be dire. That urgent interim interdictory relief can be obtained in situations such as the present, is well established. As is evident from this matter, even where the matter is expedited it can still take substantial time when compared to the duration of the contract under consideration. In my view and seeing the nature of the current contract this was a matter where the appellant should have known that the implementation of the project could potentially affect the outcome when it came to the remedy. In short, this was a case where interim relief should have been sought. In this regard the blame for the work continuing on a project can be attributed to the appellant and not to the respondents.'

[35] The Board's answer to the applicant's contention that it will suffer irreparable harm if the interim relief is not granted is simply that the applicant has failed to demonstrate (with reference to primary facts) that they will suffer irreparable harm if the interim interdict they seek is not granted.

[36] It is incontestable that the applicant was a bidder and that it was notified of its selection for award. The Board's contention that the applicant would not suffer irreparable harm is without merit. By the Board's own estimation, the pending review proceedings are envisaged to proceed for an unspecified period. It is furthermore incontestable that the Board intends to implement and enter into contracts with the bidders notified on 3 August 2023. It can also not be denied that if the contracts are executed the applicant's pending review application will be a mere academic exercise. I am therefore persuaded that the applicant will suffer irreparable harm, if the interim relief sought is not granted.

The balance of convenience.

[37] The "*balance of convenience*" requirement for interim interdicts essentially relates to the exercise of judicial discretion in terms of which the court must consider the requirements for interdictory relief in conjunction with one another. The court must also weigh the relative prejudice to the applicant and the respondent, respectively, in the alternate situations in which the relief sought is granted or not granted, as the case may

be. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*¹⁰ the court said:

‘A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant, if interim relief is not granted, as against the harm a respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests.’

[38] The Board argued that if the interim interdict is granted, the applicants will stop the Board from complying with its statutory obligations to implement the bid to benefit an innocent public. The deponent to the Board’s answering affidavit relies on the allegations that there is a public interest need to ensure that the Government always has a sufficient supply of the critical pharmaceutical products used by the Ministry to provide health services to the Namibian public at large.

[39] The deponent to the Board’s answering affidavit contends that it is a key responsibility of the Board to avoid the risk of shortages of essential and scarce products and services, which are, amongst others, contained in this bid. He continues and states that the Government needs to ensure that the risks leading to shortages in pharmaceutical products, which may worsen in the coming months, if the Court grants the interim interdict, is averted. The deponent says:

‘Therefore, the Government is duty-bound to prevent shocks and promptly avoid shortages of such products. Hence, this pharmaceutical product is intended to act as a swift response to avoid the certainty of shortages, which have already started being experienced. The Namibian public will feel the effects of this crisis, particularly the most vulnerable within the Namibian society. Therefore, the Honourable Court must decline the interim interdict sought by the applicant. Therefore, the stakeholders of CBPN, namely the third respondent, including the public, will be severely harmed if the interim interdict is granted.’

¹⁰ *Supra* footnote 6.

[40] The deponent to Board's affidavit continues and argues that the applicant will not suffer any harm if the interim interdict is not granted. It will continue to deliver under the tender because the applicant is awarded a lot of N\$48 million. Its review application will be heard in due course. If successful, the bid for the supply of pharmaceutical products remains, unlike, for example, road construction, which will be complete by the time the review is prosecuted if the interdict is not granted.

[41] This averment is at best disingenuous. The deponent of the Board's affidavit has not placed any primary facts before this court to support the contentions. The deponent to the Board's affidavit overlooks and shy's away from the irrefutable fact, that once the Board signs the contracts with other bidders a valid legal relationship between the Board and those bidders is created, and the bidders would have delivered the pharmaceutical products. No facts support the contention that the applicant can still supply the pharmaceutical products if its review application is successful. It is no more than conjecture.

Lack of another satisfactory or adequate remedy

[42] In my consideration of the question of urgency I made the finding that the applicant has no suitable alternative remedy in order to remedy the conduct giving rise to the harm. In arriving at a decision, I have considered the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities. Viewed against this legal landscape, I find that the applicant made out a case for the interim relief sought.

[43] What stands over is the question of costs. The general rule is that costs must follow the result. Nothing emerges from this matter warranting a deviation from this principle.

Order

[44] In the premises, and for the foregoing reasons, I make the following order:

1. The applicant's non-compliance with the forms and service provided by the Rules of this Court is condoned and that the matter is heard as one of urgency as contemplated by Rule 73(3).
2. The second respondent, the Central Procurement Board, and all the successful bidders in terms of the notice of selection for award dated 3 August 2023 are hereby restrained and interdicted from implementing or executing any procurement contract awarded by the Second Respondent, in respect of Tender Number: **G/OIB/CPBN01/2022**, and directed to be implemented by the Review Panel pending the outcome of this review application.
3. The second respondent, the Central Procurement Board and the Review Panel must by not later than 15 November 2023, serve on the applicant a copy of the complete record and file with the registrar the original record of such proceedings sought to be corrected or set aside together with reasons for the decision and to notify the applicant that he or she has done so.
4. The second and twenty-eighth respondents must serve on the applicant a copy of the complete record and file with the registrar the original record of the proceedings sought to be corrected or set aside together with reasons for the decision and must, by not later than 15 November 2023, notify the applicant that they have done so.
5. The applicant must, if so advised, by not later than 27 November 2023 by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its application and supplement the supporting affidavit.
6. A respondent who intends to oppose the applicant's application must file its answering affidavit to the applicant's supplemented founding affidavit by not later than 15 December 2023.

7. The applicant must if so advised, file its replying affidavit to the respondents' answering affidavits by not later than 22 December 2023.
8. The matter is postponed to 16 January 2024 at 08:30 for a case management conference.
9. The parties must file a joint case management report by not later than Friday 12 January 2024.
10. The applicant must file its heads of argument on or before 17 January 2024 and the respondents must file their heads of argument on or before 24 January 2024.
11. The matter is postponed to 31 January 2024 at 10:00 for hearing part B of the Review Application.
12. The respondents who opposed the application must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs, such costs to include the cost of one instructing and one instructed counsel.



UEITELE SFI
Judge

APPEARANCES

APPLICANT: N Bassingthwaighte (With her R Ketjijere)
Instructed By: Bröckerhoff & Associates Legal Practitioners,
Windhoek

FIRST RESPONDENT: A Corbett (With him L Ihalua)
Instructed By: Sisa Namandje Inc
Windhoek

SECOND, THIRD &
TWENTY EIGHTH RESPONDENT: T Phatela
Instructed By: Government Attorney
Windhoek

NINETH RESPONDENT: Gilroy Kasper
of Murorua Kurtz Kasper Incorporated