CASE NO: A 280/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

POWER LINE AFRICA (PROPRIETARY) LIMITED **APPLICANT**

and

SIEMENS LIMITED **FIRST RESPONDENT**

BANK WINDHOEK LIMITED **SECOND RESPONDENT**

***CORAM*:** **SILUNGWE , AJ**

Heard on: 22nd October 2008

Delivered on: 22rd October 2008

Reasons Delivered on: 14 September 2011

REASONS FOR JUDGMENT

SILUNGWE, AJ: [1] On October 23, 2008, after hearing an application that had been brought on an urgent basis, I made an *ex tempore* ruling that the applicant had failed to meet the requirements of rule 6 (12) with particular reference to paragraph (b)

thereof. In the circumstances, the Court could not exercise its discretion to condone the applicant's non-compliance with the rules of the court for lack of urgency (*MWEB Namibia (Pty) Ltd v Telecom Namibia and Others* (P)A 91/2007(unreported)), and therefore, dismissed the application with costs, including the costs of two instructed counsel.

[2] Shortly after the preceding order had been made, the parties brought a settlement agreement which was made an order of the Court.

[3] The purpose of writing this judgement is to give reasons for the order for costs. A brief background leading to the said costs order is set out hereinafter.

[4] On September 30, 2008, the applicant launched an "urgent application" in terms of rule 6 (12) for an order declaring that the performance guarantee (the performance bond) which had been issued by the second respondent in favour of the first respondent, pursuant to the terms of a construction contract between the applicant and the first respondent had expired and become unenforceable as from September 20, 2008. A further order was sought by the applicant against the first respondent, alternatively, the second respondent, to release and return the performance bond to the applicant. In addition, orders for certain interdicts, directions and costs were also prayed for by the applicant.

[5] On October 1, 2008, the day of set down, Mr. Coleman and Ms. Van der Merwe appeared for the applicant and the first respondent, respectively, before Manyarara, AJ, and the Court made an order as follows:

> 'that by agreement between the parties, the matter is hereby postponed to 22-23 October 2008 at 9:00 a.m. to be disposed of on an urgent basis on the following terms:
>
> 1. The first respondent shall deliver its answering affidavit by 10 October 2008;
> 2. That applicant shall deliver its replying affidavit by 17 October 2008;
> 3. The applicant shall deliver its heads of Arguments by 20 October 2008 and the first respondent shall deliver its Heads of Arguments by 21 October 2008;
> 4. The second respondent shall not pay any sum under the performance guarantee to the first respondent pending the decision of the Court;
> 5. Costs will stand over.'

[6] Mr. Reinecke, learned counsel for the first respondent properly submitted that the order made by the Court on 1st October 2008, to wit, that the matter should be heard as one of urgency did not dispose of the question of urgency as the issue was (or must have been) anticipated to be determined on any of the return days, that is: 22nd or 23rd October, 2008. In any event, it is clear on the papers that urgency had not, and could not have, been decided on the 1st of October, 2008, as no opportunity had yet been accorded for the filing of answering (and replying) papers, in conformity with, at least, the *audi alterem partem* rule. It was further contended that any urgency was self-created by the applicant who had been made aware of the first respondent's intention – through a notice dated 11 September, 2008 – to exercise its right under clause 4.2 of the General Conditions by claiming damages under the performance Guarantee.

[7] It is indeed common cause that on 11 September, 2008, the first respondent formally gave notice in terms of clause 4.2 of the General Conditions of the contract between the parties to claim damages against the applicant. The Notice reads:

> "NOTICE OF INTENDED CLAIM AGAINST PERFORMANCE SECURITY DELAY DAMAGES
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> 1. The employer has made a determination with respect to the delay Damages charged in terms of the above contract on 5 August 2008 in terms of which he determined that the amount of €1 062 000.00 was due and payable to him due to the contractor's failure to complete the works within the stated time for completion.
> 2. To date hereof the contractor has failed and/or neglected to pay the above amount to the employer.
> 3. In terms of clause 4.2 of the General Condition of the contract entered into between the parties, the employer now notifies the contractor of his intention to make claim under the performance security in the event that the said amount remains unpaid by 16 September, 2008..."

Under the general Conditions of the Contract between the parties, the applicant is referred to as the contactor and the first respondent as the employer. Although the applicant initially rejected the first respondent's determinations referred to in the Notice, it capitulated and accepted the aggregate claim.

[8] Mr Reinecke further submited that it was an opportune moment for the applicant to bring the application on an urgent basis when the notice was received, rather that to wait for more than a week before it could do so. I agree that the applicant should have been spurred into action earlier than 30 September when the application in the matter was launched. To add insult to injury, the applicant failed to give good and acceptable reasons for the delay in bringing the "urgent application".

[9] Rule 6 (12), which make provision for urgent applications, reads:

> '6(12)(a) In urgent applications, the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter in such time and place in such manner and in accordance with such procedure (which shall as far practicable be in terms of these rules) as to it seem meet.
>
> (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall 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 could not be afforded substantial redress at a hearing in due course".

[10] In terms of Rule 6(12)(b) the applicant must, in his or her founding affidavit, not only explicitly set out the circumstances upon which he or she relies that it is an urgent matter, but must also provide reasons why he or she claims that he or she could not be afforded substantial redress at the hearing in due course. (*MWEB Namibia (Pty) Ltd v Telecom Namibia and others* (P) A 91/2007(unreported)). In this matter, the applicant was found wanting in both respects. As regards the latter requirement, it is common cause that the General Conditions of Contract between the parties make provision for Arbitration proceedings in the event of a dispute between them; hence, the applicant failed to show that it could not be afforded substantial redress at a hearing in due course. In the circumstances, the Court could not exercise its discretion to condone the applicant's non-compliance with the rules of the Court for lack of urgency. In my view, the purported urgency was the applicant's own making.

[11] The aforegoing are the reasons that led to the costs order.

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SILUNGWE, AJ

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ADV. A, CORBETT

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ADV. J. J. REINECKE

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