

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-MOT-GEN-2022/00233

In the matter between:

NAMIBIA AIRPORTS COMPANY LIMITED APPLICANT

and

MENZIES AVIATION NAMIBIA (PTY) LIMITED	1ST RESPONDENT
PARAGON INVESTMENT HOLDINGS (PTY) LTD	
JOINT VENTURE ETHIOPIAN AIRLINES	2ND RESPONDENT

Neutral Citation: *Namibia Airports Company Limited v Menzies Aviation Namibia (Pty) Ltd and Another* (HC-MD-CIV-MOT-GEN-2022/00233) [2022]
NAHCMD 403 (11 August 2022)

Coram: SIBEYA J
Heard: 21 June 2022
Order: 29 June 2022
Reasons: 11 August 2022

Flynote: Practice – Applications and motions – Urgent application for interdict and eviction granted – Tacit relocation, Non-joinder and Collateral challenge discussed.

Summary: In 2014, the Applicant (NAC) and the first respondent (Menzies) entered into a Ground Handling Service Agreement (Service Agreement) in which Menzies provided ground handling services at Hosea Kutako International Airport (HKIA). The agreement commenced on 1 January 2014 and lapsed on 31 December 2018. It was, however, renewed for a period of three years to 31 December 2021.

NAC and Menzies further agreed to another extension of six months from 1 January 2022 to 30 June 2022. The Service Agreement was, therefore, bound to terminate by the effluxion of time on 30 June 2022.

On 13 December 2021, NAC awarded the bid to the second respondent (Paragon), in terms of which Paragon will provide ground handling services at HKIA as from 1 July 2022, after the Service Agreement with Menzies lapses by effluxion of time on 30 June 2022.

On 31 March 2022, NAC issued a notice of termination of the Service Agreement to Menzies effective 30 April 2022. On 22 April 2022, NAC withdrew its notice of termination of the agreement and argued that the Service Agreement will lapse by effluxion of time on 30 June 2022.

Menzies disputed the assertion by NAC that the Service Agreement lapses on 30 June 2022. It became apparent to NAC that Menzies will not hand over the operation of ground handling services at HKIA to Paragon on 1 July 2022.

Menzies argues that it did not consent to the withdrawal of the cancellation letter, therefore, the Service Agreement terminated on 30 April 2022 and subsequently, there was a tacit relocation of the agreement.

The NAC argues that the Service Agreement is still in force and seeks to interdict Menzies from rendering ground handling services after the termination of the Service Agreement on 30 June 2022 and to evict Menzies from HKIA after the termination of the Service Agreement.

Held that – Menzies was required to prove the tacit relocation by establishing that both parties, after the termination of the initial Service Agreement, conducted themselves in a manner that gives rise to an inescapable inference that they both desired to revive their former contractual relationship.

Held that – Menzies failed to prove that the parties conducted themselves in a manner in which it can be unequivocally inferred that the parties intended to enter into a new (oral) agreement, which came into existence from a definite and specified date onwards.

Held that – NAC proved that it has a future right with effect from 1 July 2022 and that a declaratory relief can be granted in the exercise of the court's discretion.

Held that – The claim by NAC goes beyond pure commercial interests as it delves into the realm of public interest and NAC demonstrated the circumstances which render the matter urgent.

Held that – Where a decision of a subordinate body is confirmed by a superior body, the decision of such subordinate body cannot be challenged without attacked the confirmatory decision of a superior body, and where the subordinate decision is attacked without citing the superior body the matter can be struck from the roll for non-joinder.

Held further that – NAC's urgent application succeeds.

ORDER

1. The applicant's non-compliance with the prescribed periods of time and forms of service, is hereby condoned and the matter is enrolled as one of urgency in terms of Rule 73 (3) of the Rules of this court.

2. It is declared that the agreement entered into between the applicant and the first respondent for the first respondent to provide ground handling services at Hosea Kutako International Airport (“HKIA”) shall terminate on 30 June 2022 (“the termination date”).
3. It is declared that the first respondent shall, at the end of the day on the termination date:
 - 3.1 cease to provide ground handling services at HKIA;
 - 3.2 hand over all security access cards or other equipment entitling it to access HKIA or any premises which it occupies at HKIA by virtue of the ground handling services agreement with the applicant;
 - 3.3 vacate occupation of any premises at HKIA occupied by virtue of the ground handling services agreement.
4. If the first respondent refuses to give effect to the order set out in paragraph 3 above, then the Deputy Sheriff of this Court is directed to:
 - 4.1 evict the first respondent from HKIA and from all premises of HKIA occupied by the first respondent by virtue of the ground handling services agreement;
 - 4.2 remove all equipment belonging to the first respondent from the HKIA;
5. The order that the first respondent’s counter-application is dismissed is varied in terms of rule 103(1) to read that the first respondent’s counter-application is struck from the roll.
6. The first respondent is ordered to pay the applicant’s costs of the application and opposition to the counter-application and such costs to include costs of one instructing and two instructed Counsel, and further pay the second

respondent's costs limited to the counter-application which includes costs of two counsel.

7. The matter is removed from the roll and regarded as finalised.

JUDGMENT

Sibeya J:

Introduction

[1] This is an application brought on an urgent basis by Namibia Airports Company Limited (NAC) against Menzies Aviation Namibia (Pty) Ltd (Menzies). In kernel, NAC seek an order to stop Menzies from rendering ground handling services at Hosea Kutako International Airport (HKIA) on 30 June 2022. The application is premised on the effluxion of time stipulated in the ground handling contract entered into between NAC and Menzies.

[2] In aviation, the term "ground handling services" refers to the wide range of services provided to facilitate an aircraft flight or aircraft ground repositioning, and this includes, passenger handling, baggage handling, cleaning, surface transport, customer service and ramp service functions. HKIA needs a ground handler to operate. NAC procures third parties to furnish these services at HKIA.

Parties and representation

[3] The applicant is Namibia Airports Company Limited, a public enterprise, established in terms of section 2 of the Airports Company Act 25 of 1998 with its principal place of business situated at 154 Independence Avenue, Sanlam Building, Windhoek; and is the owner, operator and controller of the Hosea Kutako

International Airport (HKIA), the main international airport in Namibia. The applicant will be referred to as 'NAC'.

[4] The first respondent is Menzies Aviation Namibia (Pty) Ltd, a company with limited liability, duly registered and incorporated in terms of the company laws of the Republic of Namibia and having its registered address and principal place of business at Bougain Villas, 76 Sam Nujoma Drive, Windhoek. Where reference is made to the first respondent it will be referred to as 'Menzies'.

[5] The second respondent is Paragon Investments Holdings (Pty) Ltd JV Ethiopian Airlines, a joint venture with its principal place of business at 40 Eros Road, Eros Windhoek. Where reference is made to the second respondent it will be referred to as 'Paragon'.

[6] NAC was represented by Mr Bhana SC, Menzies was represented by Mr Heathcote SC while Paragon was represented by Mr Namandje.

[7] The court appreciates the assistance and contributions made by counsel in the determination of this matter.

Background

[8] In 2014, NAC and Menzies entered into a Ground Handling Service Agreement (Service Agreement) in which Menzies provided ground handling services at HKIA. The agreement commenced on 1 January 2014 and lapsed on 31 December 2018. It was, however, subject to renewal and was renewed for a period of three years. The Service Agreement was further renewed for another three-year period from 1 January 2019 to 31 December 2021.

[9] NAC and Menzies further agreed to another extension of six months from 1 January 2022 to 30 June 2022. The Service Agreement was, therefore, bound to terminate by the effluxion of time on 30 June 2022. The Second Addendum to the agreement which provides for the extension of the contract from 1 January 2022 to 30 June 2022 stipulates as follows in clause 3.2:

'The Agreement shall be extended for a further period of six (6) calendar months with effect from 01 January 2022 until 30 June 2022, unless terminated earlier by either party- via giving the other party a one (1) calendar month written notice.'

[10] On 31 March 2022, NAC gave notice of termination of the Service Agreement to Menzies with effect from 30 April 2022.

[11] NAC withdrew the said notice on 22 April 2022. Menzies, with all force and might, challenges the purported withdrawal of the notice of termination on the basis that such notice cannot be withdrawn by the party unilaterally. Withdrawal of a notice of termination requires the consent of both parties to the contract.

[12] On 22 April 2022, NAC wrote a letter to Menzies requiring an undertaking that Menzies will vacate HKIA on 30 June 2022 and hand over to the successful bidder, Paragon. Menzies responded on 25 April 2022 that Paragon will not be capable to provide the proper service from 1 July 2022, but was silent on the undertakings requested.

[13] On 26 April 2022, Menzies further wrote to NAC repeating that Paragon lacks the capacity to carry out ground handling services and requested for an extension of the contract until the review application filed by Menzies against the bid award to Paragon is finalised. Menzies filed the Review application against the award of the bid to Paragon to provide ground handling services at HKIA. Menzies was still silent on the undertakings requested.

[14] On 29 April 2022, NAC sent a letter to Menzies requesting confirmation that Menzies will abide by the agreement and vacate HKIA on 30 June 2022 in order to enable Paragon as the successful bidder to render ground handling services with effect from 1 July 2022.

[15] On 9 May 2022, NAC reminded Menzies in writing that Menzies has not responded to NAC's letters of 22 April 2022 and 29 April 2022. Still, Menzies remained silent. On 10 May 2022, NAC sent an email to Menzies as a follow-up to its letter of 9 May 2022.

[16] On 22 May 2022, NAC wrote to Menzies where it recorded its dismay towards Menzies' failure to respond to its requests. In the same letter, NAC stated that it will not extend the agreement beyond 20 June 2022. NAC stated further that the failure of Menzies to express itself on the undertakings requested was aimed at frustrating the smooth handover to Paragon and therefore left NAC with no option but to seek urgent relief in this court.

[17] On 23 May 2022, Menzies responded to NAC's letters of 22 April 2022, 28 April 2022, 9 May 2022 and 22 May 2022, wherein the main, Menzies stated that it was no longer rendering ground handling services in terms of clause 3.2 of Addendum 2. Menzies, therefore, disputed the assertion by NAC that the agreement lapses on 30 June 2022.

[18] On 1 July 2022, the new service provider, Paragon, was scheduled to commence to rendering ground handling services at HKIA.

[19] To this end, it was undisputed that:

(a) NAC notified and engaged stakeholders regarding Paragon's takeover of ground handling services at HKIA.

(b) Paragon spent nearly N\$6 million to ensure that it can provide ground handling services at HKIA. Above all, Paragon confirmed that it is prepared and able to provide ground handling services from 1 July 2022.

[20] The nature of airport operations requires all stakeholders to be informed well in advance of the identity of the new service provider and this led to NAC informing airlines of the new service provider by 22 April 2022. This was more than two months before Paragon could commence to render services at HKIA.

[21] It was stated by NAC and Paragon that Airlines engaged Paragon to ensure that its officials undergo additional training (required by some of the airlines) and that Paragon further procures the necessary equipment to service each airline's aircrafts.

[22] The refusal by Menzies to make undertakings to comply with the agreement and to vacate HKIA on 30 June 2022 demonstrated to NAC that Menzies had no intention to vacate HKIA by 30 June 2022, so NAC claims. The refusal further showed a desire to hamper the smooth transition of ground handling services to Paragon on 30 June 2022.

[23] It is in the premises of the stand-off between NAC and Menzies, that NAC approached this court on an urgent basis seeking the following relief:

‘1. Condoning the applicant’s non-compliance with the rules of Court in so far as it relates to the forms and service of the application in terms of rule 73(3)... and directing that the matter be heard as one of urgency.

2. Directing that the agreement entered into between the applicant and first respondent in terms of which the first respondent rendered ground handling services at the Hosea Kutako International Airport (“HKIA”) shall terminate on 30 June 2022 (“the termination date”).

3. Declaring that the first respondent shall be obliged at the end of the day on the termination date:

3.1 To cease providing all services at HKIA;

3.2 To vacate occupation of any premises at HKIA; and

3.3 To hand up all security access card or other access equipment entitling it to access to HKIA or any premises which it occupied at HKIA by virtue of the agreement with the applicant which shall terminate on the termination date.

4. In the event that the first respondent refuses to give effect to the order in paragraph 3 above, directing the Deputy Sheriff of the Honourable Court, alternatively any member of the Namibian Police Force who is furnished with a copy of the order:

4.1 To evict the first respondent from HKIA and from all premises occupied by the first respondent by virtue of the agreement that will terminate; and

4.2 Removing all equipment belonging to the first respondent at the HKIA and any other premises occupied by it under the agreement with the applicant.

5. Directing the first respondent to take all steps necessary to enable the second respondent to commence and render ground handling services and other services at HKIA which were the subject matter of the concession awarded to the second respondent.

6. Costs of suit, including costs of two instructed counsel and one instructing counsel.'

[24] Menzies then filed a counter-application for setting aside the award to Paragon and in the alternative sought an interim interdict pending finalization of the review application instituted by Menzies under case number HC-MD-CIV-MOT-REV-2022/00155. In the further alternative, Menzies in its counter-application seeks a stay of the applicant's declaratory relief and the eviction application.

Applicant's case and argument

[25] Mr Bhana argued that Menzies' refusal to provide the requisite undertakings was an indication that it intended to disrupt operations at HKIA (or, at the very least, its actions will cause such an outcome), and to unlawfully entrench its position beyond the terms of the Service Agreement.

[26] Mr Bhana's argued that if Menzies tries to provide ground handling services after 30 June 2022 or if there is any confusion about who the ground handler is, airport operations will no doubt be adversely affected. Airport operation may even be brought to a halt if there are two service providers on-site, being Menzies and Paragon, both attempting to perform the same service (or the old provider frustrating the new provider). This will cause chaos among airlines, passengers, NAC, HKIA and the Namibian people. The consequences have far-reaching effects which could cause irreparable harm to the economy.

Second Respondent's case and argument

[27] Mr Namandje, for obvious reasons, supported the NAC's application, because, as expected, Paragon invested financial and human resources in its preparations so as to ensure that on 1 July 2022, it will be in a position to carry out its obligations in terms of the Award.

[28] Mr Namandje argued that Menzies' failure to provide the requisite undertaking to vacate by 30 June 2022 and ensure a smooth transition to Paragon amounts to lawless and opportunistic behaviour that should not be countenanced.

[29] Mr Namandje argues that this Court has a high duty to act in the face of such primitive and repugnant conduct on the part of Menzies. He claims, Menzies must "pack and go" until the Court decides otherwise. Mr Namandje relied on the case of *Chief Lesapo v North West Agricultural Bank and Another*,¹ where the Court appropriately stated that:

[22] In this analysis, an important consideration in terms of s 36(1)(a) is the nature of the right impaired. The right of access to courts is important in the adjudication of justiciable disputes. In *Concorde Plastics (Pty) Ltd v NUMSA and Others*,² Marcus AJ expressed the importance of the right as follows:

In my view, access to the courts of law is foundational to the stability of society. It ensures that parties to a dispute have an institutionalised mechanism to resolve their differences without recourse to self-help. The nature of civil proceedings has been eloquently described by Eduardo Couture *The Nature of Judicial Process* (1950) 25 *Tulane Law Review* 1 at 7 in the following way:

The facts tells (*sic*) us that when a plaintiff wants to instigate a suit, he can do so although the defendant does not want him to do so, nor even the Judge. This is a fact derived from legal experience, from the life of law.

Those who have been able to see this fact in historical perspective and have noted its slow but steady growth, have realised that the law has proceeded in this direction from necessity, not from expediency.'

First Respondents arguments

[30] Mr Heathcote, commenced his arguments with vigour. To start, he argued that the "perceived agreement" which extended the Service Agreement is not binding on Menzies, and thus the Service Agreement does not end or expire on 30 June 2022. He argued that the Service Agreement ended on 30 April 2022 due to NAC's

¹ *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

² *Concorde Plastics (Pty) Ltd v NUMSA and Others* 1997 (11) BCLR 1624 (LAC) at 1644F - 1645A.

termination notice issued on 31 March 2022. He relied on the case of *Rustenberg Town Council v Minister of Labour and Others*³ where the court held as follows:

‘The giving of notice is an (*sic*) unilateral act; it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it. If so, it seems to me to follow that notice once given is final, and cannot be withdrawn – accept (*sic*) obviously by consent – during the time in excess of the minimum period of notice.’

[31] To this end, Mr Heathcote submits that there was a tacit relocation of the Service Agreement after it ended on 30 April 2022 (tacit lease). In other words, a new oral agreement came into existence with the terms being the same as the Service Agreement. In support of this contention, Mr. Heathcote relied on the case of *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others*.⁴

[32] He further submits that because the new oral agreement which came into existence between NAC and Menzies does not provide for the period to cancel the agreement and notice to vacate, he holds the view that the Rent Ordinance 13 of 1977, and more specifically section 32 thereof, comes into play, which provides as follows:

‘32. (1) (a) (i) When a lessor gives notice to a lessee to vacate business premises or a dwelling, such lessor shall

- (a) in the case of business premises, give notice of at least 1 year; and
- (b) ...

irrespective of whether the lease provides for a period of notice or not: Provided that

(i) the lessee of business premises or of a dwelling may consent in writing on a later date than the commencement or renewal of the lease to a shorter period of notice than that provide for in this section; and...’

[33] In summation, Mr Heathcote submits that the NAC has no cause of action and that this application, even if the Service Agreement would have come to an end on 30 June 2022, is at best, premature. For this reason alone, the application is an

³ *Rustenberg Town Council v Minister of Labour and Others* 1942 TPD 220 at 224.

⁴ *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others* 2002 (1) SA 822 (SCA).

abuse of process, and stands to be dismissed with costs, so he submits. This is dealt with as the judgment unfolds.

Urgency

[34] In respect of urgency, the arguments from the respective counsel were straightforward and brief. However, for the sake of completeness, I will highlight rule 73(4), which is the golden rule for urgent applications, and it provides that:

‘(4) In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –

- (a) the circumstances which he or she avers render the matter urgent; and
- (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.’

[35] Mr Bhana emphatically argued that, Menzies has no legal right to occupy HKIA and provide ground handling services after 30 June 2022. At the same time, however, NAC which must act on behalf of the interests of the Namibian people and HKIA cannot wait for a hearing in the ordinary course to vindicate its rights that would only occur way after 30 June 2022. NAC, HKIA and the Namibian people will suffer severe and irreparable harm if Menzies continues to occupy HKIA and frustrates the smooth transition of ground handling services to Paragon, Mr Bhana argued.

[36] Mr Bhana was clear that NAC awarded the bid to Paragon to render ground handling services at HKIA and Paragon commenced with its preparation to render such services effective 1 July 2022. If the application is enrolled in the ordinary course, the matter will likely only be heard in 2023, long after the critical date of 30 June 2022, to the prejudice of NAC, the Namibian people, HKIA and Paragon, so he argued.

[37] Mr Heathcote from the onset denied that the matter is urgent or that the applicants have satisfied the mandatory requirements of rule 73(4). He submitted that NAC failed to state the circumstances that render the matter urgent and why they claim that they cannot be afforded substantial redress at a hearing in due course.

[38] Mr Heathcote, emphatically argued that, even though NAC relies on commercial urgency based on commercial harm alleged to be suffered if a matter is not heard on an urgent basis, in commercial disputes, the requirements of urgency still need to be complied with.

[39] In support of this contention, the case of *Petronaft International Glencor Energy UK Ltd and Another v Minister of Mines and Energy and Others*⁵ where the issue of urgency in commercial matters was reconfirmed, was relied upon. The court pointed out in paragraph [28] that:

‘In commercial matters there would thus be degrees of urgency and it would be incumbent upon applicants to demonstrate with reference to the facts of a specific matter that they are unable to receive redress in the normal course and that the facts justify the urgency with which the application has been brought. They must not however have created their own urgency and would need to have afforded the respondents a sufficient opportunity to deal with the matter raised. It would be a question of fact to be determined in each case.’

[40] If one has regard to the correspondence exchanged between the parties, it demonstrates that in several letters of 22 April 2022, 29 April 2022, 9 May 2022, 10 May 2022 and 22 April 2022, NAC sought undertakings from Menzies to vacate HKIA on 30 June 2022. Menzies was silent on the request for undertakings until 23 May 2022 when Menzies refused to provide the undertakings. This is when the issue of urgency truly arose, which caused NAC to file its application on 27 May 2022.

[41] It would have been irresponsible of NAC to rush to court if litigation would be avoided with the undertakings. Therefore, the trigger date for urgency is 23 May 2022 not 22 April 2022. Failure to file the urgent application in April 2022 and only filing same in May 2022, as Menzies argued does not diminish the urgency of the

⁵ *Petronaft International Glencor Energy UK Ltd and Another v Minister of Mines and Energy and Others* (A24/2011) [2011] NAHC 125 (28 April 2011).

application. This approach is justified by the facts of the matter and the uncooperative stance taken by Menzies between April and May 2022 by not addressing the requested undertakings. Menzies cannot cry foul as it has itself to blame for not cooperating earlier and reveal its position in April 2022 in order for NAC to weigh its options.

[42] The claim by Menzies that pure commercial interests can play no role in assessing urgency is wrong in law. There are well-established authorities which held that commercial interests deserve protection in urgent proceedings.⁶ Be that as it may, I find that the relief, however, goes beyond pure commercial interests, as it delves into the realm of public interest.

[43] Having appointed Paragon to take over the ground handling services by 1 July 2022 and considering that Paragon was notified and prepared to commence to render ground handling services and the stakeholders were informed of the new ground handler, Paragon, by 22 April 2022, NAC had the responsibility to ensure that Paragon commences to render the ground handling services by 1 July 2022 free from any encumbrance. NAC became aware on 23 May 2022 that Menzies will not vacate HKIA as such, NAC opted not to sleep on its rights by waiting until 30 June 2022 to invoke any such rights.

[44] I find that NAC acted proactively to protect its interest in order to seek an interdict and an eviction order which cannot be remedied after 30 June 2022. The declarator and the eviction orders are crucial to ensure smooth handover to Paragon.

[45] I further find that the NAC has demonstrated the circumstances which render the matter urgent; and the reasons why it claims it could not be afforded substantial redress at a hearing in due course.

Discussion

⁶ *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G-H; *Mweb v Telecom* 2012 (1) NR 331 (HC) para 22.

[46] Menzies claims that the Service Agreement ended on 30 April 2022, due to NAC's termination notice issued on 31 March 2022. I find this argument worrisome for the following reasons:

a) Menzies continued to provide ground handling services at HKIA after the withdrawal notice. Menzies never vacated the premises and it never stopped providing ground handling services after 30 April 2022. Indeed, until the answering affidavit was filed in this matter, Menzies never informed NAC or suggested that the contracting parties were performing under a new type of contractual arrangement. I agree, with Mr Bhana's submission that this defence was a desperate afterthought.

b) Moreover, after NAC withdrew the notice of cancellation of the agreement on 22 April 2022, Menzies, in an email dated 25 April 2022 and a letter of 26 April 2022 from its lawyers addressed to NAC's lawyers expressed concern about the capabilities of Paragon to render the services and requested that the existing Service Agreement be extended until after the finalisation of the review application.⁷

c) In the plea for an extension, Menzies expressly acknowledged that NAC withdrew its cancellation notice, thereby requiring Menzies to continue providing services until 30 June 2022 but not any period after that. This position demonstrates that Menzies accepted the withdrawal of the cancellation notice and continued to perform under the existing Service Agreement which is due to lapse on 30 June 2022.

d) If Menzies' position is that the Service Agreement terminated on 30 April 2022, and further that the agreement was no longer due for termination on 30 June 2022 as it claims in these proceedings, it defeats logic why it

⁷ Annexure "FA6" and "FA7" to the Founding Affidavit where it is stated that: "... It is common knowledge that Paragon Investment Holdings (Pty) Ltd JV Ethiopian is not capable of providing ground handling services, thereby forcing your client to withdraw its cancellation letter of 31 March 2022 and requesting our client to provide such services until 30 June 2022.

Having regard to the specific requirements of various stakeholders, in particular airlines, you are hereby advised that Paragon would not be capable to provide proper service from 1 July 2022.

The Review would also not be finalized by 1 July 2022. You are urged to advise your client, in its own interest to extend our client's agreement until finalization of the Review process."

would then request for an extension of the existing Service Agreement until the finalisation of the review application.

e) In my view, Annexure “FA6” and “FA7” lays bare the fact that Menzies acknowledged that NAC withdrew its cancellation letter of 31 March 2022 and therefore the Service Agreement was due to terminate on 30 June 2022. Subsequent to being alive to the imminent termination of the Service Agreement on 30 June 2022, Menzies was specific that the review application will not be finalised by 1 July 2022. This is significant, as it cements Menzies’ knowledge of the termination of the Service Agreement by 30 June 2022, hence it was concerned about the date of 1 July 2022, when the Service Agreement would have been terminated before finalisation of the review application.

f) It is my view further that, Menzies had the full knowledge and acceptance of such knowledge, that the Service Agreement cancellation was withdrawn, thus leaving the terms of the Service Agreement intact and applicable to the parties, with the consequence that such agreement will lapse on 30 June 2022. It is this knowledge that led Menzies to request for an extension of the Service Agreement until such time that the review application is finalised.

g) If at all Menzies was of the view that the Service Agreement was terminated on 30 April 2022 and proceeded to render ground handling services on the basis of tacit relocation, it offers no explanation why Menzies requested for the extension of the Service Agreement on 25 and 26 April 2022 to a period after finalisation of the Review application. Menzies’ request for extension means an extension on the existing terms and conditions of the agreement and does not constitute tacit relocation. Menzies accepted the withdrawal of the cancellation and proceeded to render ground handling services based on the Service Agreement.

h) The above findings, coupled with the fact that Menzies only mentioned the aspect of tacit relocation in the answering papers, I find that this constitutes an afterthought aimed at shifting the goal posts.

[47] Masuku J in *Ramirez v Frans*,⁸ while discussing rectification of a contract remarked as follows at para 52:

'It is thus clear that the expressed conduct ... was not consistent with the agreement having lapsed as claimed. Their conduct was actually consistent with the agreement still being in force. The defendants should not, in my considered view, be allowed to blow hot and cold at the same time — to approbate and reprobate, as it were. It is either that the agreement had lapsed, in which case, they should have conducted themselves in that manner, or it was still valid, in terms of which they sought particulars to still give effect to the wishes of the contractants'.

[48] In my view, the above remarks find equal application to the determination of whether or not a contract between the parties lapsed or not. In *casu*, the determination is whether or not it was still an agreement between the parties that the Service Agreement will lapse on 30 June 2022. Menzies' words of acknowledging the withdrawal of the cancellation letter and request for extension and conduct of rendering services in terms of the Service Agreement unequivocally establish that it had accepted the withdrawal notice of cancellation.

[49] It follows as a result that, the Service Agreement, remains in force until 30 June 2022, after which it lapses by the effluxion of time.

Was there tacit relocation?

[50] Menzies argues with force and might that there was a tacit relocation of the agreement after the Service Agreement allegedly ended on 30 April 2022 (tacit lease). In a nutshell, Menzies argues that an oral agreement came into existence with the terms being the same as the Service Agreement subsequent to the alleged termination of the said Service Agreement on 30 April 2022.

[51] Mr Heathcote argued that the Service Agreement was terminated on 30 April 2022 and at best what may regulate the termination of the existing agreement between the parties is the Rent Ordinance, 13 of 1977. Mr Heathcote laid great store

⁸ *Ramirez v Frans* (I 933/2013) [2016] NAHCMD 376 (25 November 2016).

on the matter of *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others*,⁹ for the contention that a tacit agreement is a new agreement and not a continuation of the old agreement and that for the court to determine if a tacit relocation has occurred it must consider the external manifestations and not the subjective working of the mind of the parties.

[52] In agreement with the said principles set out in *Golden Fried Chicken (supra)*, Damaseb JP in *Kalipi Ngelenge t/a Rundu Construction v Anton E Van Schalkwyk t/a Rundu Welding & Construction*,¹⁰ at para 12 remarked as follows:

‘A tacit relocation of an agreement is said to arise where parties after the termination of the initial agreement conduct themselves in a manner that gives rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before. A tacit relocation of an agreement is a new agreement and not the continuation of the old one: *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others* 2002 (1) SA 822 (SCA) at 825D-E. An essential prerequisite of a relocation of a lease agreement is that it must be unequivocally inferred from the conduct of the parties that a renewed or new lease had come into effect.’

[53] The onus of proving the existence of a tacit agreement or provision rests on the person alleging such existence of an agreement or provision. In *casu*, Menzies has the onus to prove the existence of the alleged tacit agreement.

[54] I hold no qualms with the principle on tacit relocation set out in *Golden Fried Chicken*. In fact it constitutes good law and part of our law as endorsed in the *Kalipi Ngelenge* matter. The question to be answered is whether or not Menzies managed to prove, that in this matter, there was tacit relocation. Mr Bhana argued that Menzies remained in its starting blocks in its attempt to prove that there was tacit relocation in the present matter.

[55] In order to determine if there was tacit relocation of the agreement between the parties, I find it critical to bear in mind that:

⁹ *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others* 2002 (1) SA 822 (SCA).

¹⁰ *Kalipi Ngelenge t/a Rundu Construction v Anton E Van Schalkwyk t/a Rundu Welding & Construction* 2010 (2) NR 406 (HC).

- (a) A tacit relocation is a new agreement and not a continuation of the old agreement;
- (b) A tacit agreement arises where both parties to an agreement, after the termination of the initial agreement, conduct themselves in such a manner that there is an inescapable inference that both parties desired to revive their former contractual relationship on the same terms as existed before;
- (c) In determining whether a tacit agreement exists, the court has regard to the external manifestations and not the subjective workings of the mind;
- (d) The reference to the “same terms” does not imply that each and every term of the initial agreement forms part of the tacit agreement.

[56] In further keeping with the *Kalipi Ngelenge* matter, it is incumbent on Menzies to prove that both parties, after the termination of the initial agreement, conducted themselves in a manner that gives rise to an inescapable inference that they both desired to revive their former contractual relationship. It must be unequivocally inferred that a new agreement has come into effect.

[57] In *casu*, Menzies failed to prove that a new agreement came into existence as compared to a continuation of the Service Agreement. This much is apparent from Annexure “FA6” and “FA7” where Menzies acknowledges the withdrawal of the cancellation letter and requests for an extension of the Service Agreement to a period after the finalisation of the Review application. In the face of Annexure “FA6” and “FA7” it cannot be said, in my view, that there was a new agreement concluded by the parties in the form of tacit relocation.

[58] Menzies, in my view, failed to establish that the Service Agreement was cancelled as it consented to the withdrawal of the cancellation notice and asked for an extension of the agreement. Menzies further failed to establish that both parties conducted themselves in a manner that gives rise to an inescapable inference that they both desired to revive their former contractual relationship. To the contrary, I

find that, both parties conducted themselves in perpetuation of the Service Agreement.

[59] I further find that, Menzies has failed to prove that the parties conducted themselves in a manner in which it can be unequivocally inferred that the parties intended to enter into a new (oral) agreement, which came into existence from a definite and specified date onwards, on the “same terms” as defined in *Golden Fried Chicken*. Menzies further failed to plead averments in support of its position, to establish the material terms of the new tacit lease agreement.

[60] As alluded to above, the conduct of the parties and their correspondence suggest the continuation of the Service Agreement and nothing more.

[61] What is worse for Menzies is that its conduct suggests that, on its own as a single party, it did not prove that it acted in a manner that is suggestive of an inescapable inference that the Service Agreement was terminated and therefore conducted itself in terms of a new oral agreement. To the contrary, the proven facts are that Menzies also continued to act in terms of the Service Agreement. I find that the submission that the parties entered into a new tacit agreement is farfetched and unsustainable on the facts.

[62] Considering the findings and conclusions that I reached above, I consider it unnecessary to entertain the arguments on the Rent Ordinance, as in my view, there was no tacit agreement between the parties that could pave way for the consideration of such Ordinance.

Paragons' Capabilities

[63] One of the issues raised by Mr Heathcote, which I similarly consider of importance to address in this judgement, is the question of whether Paragon is competent and capable of providing ground handling services at HKIA.

[64] Menzies, in this regard, blows hot air as it does not base such serious assertions on established facts or tangible evidence. Menzies is not privy to the operations of Paragon. Paragon has stated under oath, *inter alia*, that it is able and

ready to provide ground handling services at HKIA effective 1 July 2022 and further that subsequent to being awarded the bid, it has spent close to N\$6 million in preparation to commence operations.

[65] This court has no reason to doubt Paragon's capabilities to render the ground handling services at HKIA, neither was clear evidence put before court to demonstrate such incapability.

[66] In any event, NAC is duty-bound to ensure that the ground handling services rendered at HKIA are consistent with the objects of the NAC. Section 5(2)(a) of the Airports Company Act, 25 of 1998 provides that:

'(2) The Company may –

(a) Enter into an agreement with any person, organisation or authority to perform a particular act or render a particular service on behalf of or in favour of the Company, and may let or subcontract any facility or service it is required or entitled to provide or render, but any such contract shall be consistent with the objects of the Company.'

[67] NAC retains a duty to ensure the entity appointed to carry out ground handling services at HKIA, carries out such functions in conformity with the objects of NAC. Failure to conform to the objects of NAC, may result in NAC acting accordingly in order to ensure that the rendering of ground handling services is consistent with the objects of NAC.

[68] Another important provision to the subject is section 63 of the Public Procurement Act, 15 of 2015 which provides that:

'(1) Despite anything to the contrary in any other law, a public entity may withdraw an award or terminate a procurement contract at any time for its convenience on the grounds of changed circumstances –

(a) in that the continuation of the contract is not or will not be in the public interest; or
(b) any variation in a contract price causes the total contract amount to exceed by more than 15 per cent.

(2) Upon termination under subsection (1), the contractor is entitled to reimbursement of expenses incurred in the performance of the contract, but is not entitled to recover anticipated profits on the completion of the contract.'

[69] In light of the above, it is clear as day that if Paragon cannot perform on the commended standard, the Award may be terminated. I thus find that Paragon's capabilities are irrelevant to this matter and purely academic in nature.

Non-Joinder of the airlines and the Namibia Civil Aviation Authority

[70] Menzies argued that NAC failed to join airlines and the Namibia Civil Aviation Authority and that such non-joinder is fatal to NAC's application. Mr Heathcote argued that the NAC had a duty to join the airlines that utilise HKIA and the ground handling services as they have a direct and substantial interest in the services rendered. Mr Heathcote argued that, where there are no airlines there is no Menzies and no Paragon and probably no NAC. He further argued that the Directorate of the Namibia Civil Aviation Authority should have been cited by virtue of the oversight role that it plays in civil aviation in Namibia. Failure to cite the said Directorate is fatal, so it was argued.

[71] It is established law that a party must be joined to the proceedings if it has a direct and substantial interest in the order sought. That means that it is necessary to join a party if the order cannot be sustained or carried into effect without prejudicing such party's rights.¹¹

[72] Cheda J in *Maletzky v Minister of Justice and Others*,¹² discussed non-joinder of necessary parties and remarked as follows at para 10 and 11:

'[10] A direct and substantial interest is an interest in the right which is the subject matter of the litigation by the litigant and not merely a pecuniary interest. See *Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*. Our courts have, in the interests of justice, adopted a strict approach to the need for joinder of parties with direct and substantial interest to an extent that when that need becomes apparent, they will ensure that interested parties are afforded an opportunity to be heard. This, of course, is in line with the time-honoured and revered principle of *audi alteram partem*. See *Ex parte Body Corporate of Caroline Court and Pretorius v Slabbert*.

¹¹ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) 659.

¹² *Maletzky v Minister of Justice and Others* 2014 (4) NR (HC) 960-961.

[11] The relief sought by applicant has far-reaching consequences as it affects the entire social, political, legal, commercial and economic strata of the nation. The parties who have not been cited are necessary parties as their non-joinder will no doubt result in serious prejudice to them...'

[73] The relief sought in this matter is to interdict Menzies from rendering ground handling services after the termination of the Service Agreement and evicting Menzies from HKIA and other relief. While airlines may have an indirect financial interest in the matter, such interest cannot be said to constitute a direct and substantial right in view of the fact that it is NAC that appoints a ground handler to render ground handling services on its behalf.

[74] Except for stating that the Directorate of the Namibia Civil Aviation Authority exercises oversight over civil aviation in Namibia, it is not clearly set out why the said Directorate should be joined in the proceedings. The relief sought by NAC causes no envisaged prejudice to the Directorate in the exercise of its statutory responsibilities to oversee the aircraft safety. It is not foreseeable as to how the relief sought by NAC could affect the Directorate. In my view, there is no direct and substantial interest established that the airlines and the Directorate have in the orders sought by NAC to command their joinder in this matter. I, therefore, find that the point of non-joinder raised by Menzies lacks merit in this matter.

Menzies' counter-application

[75] Menzies launched a counter-application based on a collateral challenge which attacks the lawfulness of the award of the bid to render ground handling services at HKIA to Paragon. Menzies filed a review application where it challenged the award of the bid by NAC to Paragon. The said review application is pending before this court.

[76] It is beyond dispute that the review of the tender award is relevant to Paragon being awarded the bid.

[77] Shivute CJ in *Black Range Mining (Pty) Ltd v Minister of Mines and Energy and Others NNO*¹³ discussed what a collateral challenge entails and said the following at para 20:

‘As a general principle, a collateral challenge to an administrative act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. The general thread that runs through the case law is that a collateral challenge may be allowed where an element of coercion exists: a typical example is where the subject is threatened with coercive action by a public authority into doing something or refraining from doing something and the subject challenges the administrative act in question “precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question”. It must be the right remedy sought by the right person in the right proceedings.’

[78] Menzies opted to lodge a review application of the award of the bid to Paragon without seeking an interim interdict to stop any person from acting in terms of the impugned bid.

[79] Damaseb DCJ in *New Era Investment (Pty) Ltd v Roads Authority*¹⁴ remarked as follows at para 45:

‘Given our conclusion on the other grounds, it is not strictly necessary to decide this ground. It however bears mention that in electing to seek urgent review without interim interdictory relief, the appellant accepted the risk that came with such an election. The point made by Mr Maleka should therefore serve as a warning to applicants who seek review without seeking interim interdictory relief.’

[80] Menzies chose to review the award of the bid, but did not seek an interim interdict, thus not taking heed of the above warning by Damaseb DCJ in the *New Era Investment* matter. Menzies made the said decision out of choice and which decision it must live with. In the absence of the interim interdict, nothing prevented NAC from effecting the award of the bid.

¹³*Black Range Mining (Pty) Ltd v Minister of Mines and Energy and Others NNO* 2014 (2) NR 320 (SC).

¹⁴*New Era Investment (Pty) Ltd v Roads Authority* 2017 (4) NR 1160 (SC) at 1172.

[81] Menzies, in the pending review application, challenges the decision of NAC to award the bid to render ground handling services to Paragon. The decision by NAC to award the bid to Paragon was challenged at the Review Panel in terms of the Public Procurement Act. The Review Panel dismissed Menzies' review application. Mr Namandje argued that the decision of NAC cannot be challenged in these proceedings where the Review Panel is not cited as a party.

[82] The Supreme Court in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*¹⁵ considered the validity of impugned administrative decisions and the effect of challenging the legality of a decision without citing the decision maker and remarked as follows at paragraphs 51, 68 and 70:

'[51] The meaning and import of the presumption aside, Mr Töttemeyer contends that, in any event, it is settled law that administrative decisions stand until they are set aside by a court. In support, he cited the remarks of Lord Radcliffe in *Smith v East Elloe Rural District Council* that an administrative order —

' . . . is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

Closer to this jurisdiction, he refers to the more recent judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* where the South African Supreme Court of Appeal (per Howie P and Nugent JA) observed:

'The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

In an analytic and insightful judgment the court explored the legal basis for the apparent anomaly that even an unlawful act can produce legally effective consequences. In this context they considered the presumption of regularity and the notion of 'legal pragmatism' as possible explanations for the anomaly but ultimately adopted the proposition advanced by

¹⁵ 2010 (2) NR 487 (SC).

Forsyth that, while a void administrative act is not an act in law, it is, and remains, an act in fact' until it is set aside. In the context of that case (dealing with a public authority's disregard of the Administrator's approval to establish a township), the court held as follows (in para 37):

'In our view, that analysis of the problems that arise in relation to unlawful administrative action recognises the value of certainty in a modern bureaucratic State, a value that the Legislature should be taken to have in mind as a desirable objective when it enacts enabling legislation, and it also gives proper effect to the principle of legality, which is fundamental to our legal order . . . And this case illustrates a further aspect of the rule of law, which is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it.'

[68] A collateral challenge to the validity of an administrative decision, it has been said, will be available only if the right remedy is sought by the right person in the right proceedings. We have earlier referred to the presumption of regularity, the assumption of ostensible effectiveness and the factual foundation-theory as a basis for attaching legal consequences to administrative acts (even those which may later prove to have been invalid) until they are set aside or otherwise avoided by a court of competent jurisdiction. Until then, they may be acted on and, in determining the validity of the subsequent acts 'nothing but the formal validity' of the first act will be relevant unless, of course, it is a case where the law requires substantive validity of the first-mentioned act as a necessary precondition for the validity of the consequent act. Generally, the formal (as opposed to legal) validity of an administrative act cannot simply be disregarded by those affected by it as if it is void and does not exist in either fact or law. There is, however, an exception to the general rule, which Forsyth explains as follows:

'Only where an individual is required by an administrative authority to do or not to do a particular thing, may that individual, if he doubts the lawfulness of the administrative act in question, choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved; and the individual will be able to raise the voidness of the underlying administrative act as a defence.'

In those circumstances, for example, (i)t will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question...

[70] The registrar has a direct and substantial interest in any order invalidating her decision. To invalidate it in proceedings to which she has not been cited as a party and without according her an opportunity to defend the legality of her decision, would infringe the principles of natural justice and detract from her right to a fair hearing. That, in effect, will be the result if the collateral challenge is entertained without more. Had the second respondent been minded to challenge the validity of her decision — and we must again point out that their answering affidavits manifest no such intention — they could have sought reasons from her for her decision and brought an application for the urgent review thereof. The review application could have been enrolled before the same court either before the election application or simultaneously with it. This they did not do. In the absence of any prejudice suffered by them as a result of the assistant registrar's decision to accept the application outside ordinary office hours — properly conceded in argument in the court a quo — it would be inappropriate, if not manifestly wrong, to entertain the collateral challenge in these proceedings.'

[83] The Review Panel is not a party to these proceedings, therefore, the decision of the Review Panel cannot be challenged in this matter. The decision of NAC to award the bid to Paragon cannot strictly be challenged without challenging the decision of the Review Panel that upheld its decision. I agree with Mr Namandje that a decision of a subordinate body, so to speak, which has been confirmed by a superior body, cannot strictly be attacked without attacking the decision of the superior body's confirmation of such decision.¹⁶

[84] Menzie's failure to cite the Review Panel means that Menzies seeks to invalidate the decision of the Review Panel, which dismissed the challenge to the award of the bid to Paragon, without citing such Review Panel. Entertaining the collateral challenge, which is premised on the legality of the award of the bid, will deny the Review Panel the opportunity to defend the legality of its decision to dismiss the review application of the award of the bid by NAC. This will further deny the Review Panel its right to be heard and this offends the critical rule of natural justice of *audi alteram partem*. What is worse for Menzies, is the fact that the Review Panel is not a party to these proceedings. Menzies, in its counter-application, does not cite the Review Panel.

¹⁶ *Wingspark Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs* 2019 (2) SA 606 para 325.

[85] In view of the foregoing, the collateral challenge and the counter-application falls to be struck off the roll.

The declarator

[86] Mr Heathcote reminded the court that, in order to exercise its jurisdiction to grant the relief of a declarator, the following requirements should be met:

(a) The court must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation and then if satisfied on this aspect, then

(b) The court must decide whether the case is a proper one for the exercise of the discretion conferred on it.¹⁷

[87] I am further of the view that for the reasons mentioned, findings made and conclusions reached above, the first respondent's collateral challenge and counter-application fails to succeed. Mr Heathcote argued that NAC does not satisfy any of the said requirements and its application amounts to an abuse of the court process.

[88] From the facts of the matter, it appears that NAC does not have an existing right to interdict and evict Menzies from HKIA as the Service Agreement between the parties is still valid as found earlier. Menzies' services will only terminate on 30 June 2022 and therefore NAC has a future right that will come into effect on 1 July 2022.

[89] Menzies further argues that NAC's case is an abuse of the court process as it lacks merit. This claim is primarily based on Menzies' argument that the Service Agreement was terminated on 30 April 2022 and there was tacit relocation. I have already rejected Menzies' argument that the Service Agreement terminated on 30 April 2022. The other defences raised by Menzies have been rejected by this court. The counter-application was also rejected.

¹⁷ Section 16 (d) of the High Court Act, 16 of 1990. See also: *Durban City Council v Association of Building Societies* 1942 AD 27 at 32.

[90] In my view, NAC has proven that it has a future right with effect from 1 July 2022 and that a declaratory relief can be granted in the exercise of the court's discretion.

Conclusion

[91] The conduct of the parties, including Menzies' request for the extension of the Service Agreement from 1 July 2022 until the date after finalisation of the review application is clear as day that the Service Agreement was not terminated on 30 April 2022. To the contrary, the withdrawal of the notice of cancellation was consented to by Menzies. I find that, in the premises, there was no tacit relocation between the parties.

[92] In consideration of the reasons mentioned, findings made and conclusions reached hereinabove, I am of the view that the applicant has established a case for the relief that it seeks.

Variation of the order

[93] Order number 5 (five) of the orders that were read out before these reasons were released, reads that the first respondent's counter-application is dismissed. The veracity or the merits of the counter-application were not discussed. The counter-application failed on two grounds, namely: firstly, first respondent's failure to seek and obtain an interim interdict in pursuance of its Review application and secondly, the failure to cite the Review Panel in its counter-application. In the absence of considering the merits of the counter-application, the counter-application should not have been dismissed but ought to have been struck from the roll. This is what the Supreme Court stated in *Shetu Trading CC v Chair of the Tender Board of Namibia and Others*.¹⁸

[94] Rule 103(1), reads as follows:

¹⁸ *Shetu Trading CC v Chair of the Tender Board of Namibia and Others* 2012 (1) NR 162 (SC) para 15.

'In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment

–

- (a) erroneously sought or erroneously granted in the absence of a party affected thereby;
- (b) In respect of interest or costs granted in the absence of any party affected thereby;
- (c) In which there is an ambiguity or patent error or omission, but only to the extent of that ambiguity or omission; or
- (d) An order granted as a result of a mistake common to the parties.'

[95] The order of dismissing the first respondent's counter-application constitutes an error. Upon the realisation of the error, the court on its own initiative decided to vary the said order to read that the order that the first respondent's counter-application is dismissed is varied in terms of rule 103(1) to read that the first respondent's counter-application is struck from the roll.

Costs

[96] The principle regarding costs is firmly set in our law. It is that costs follow the event. I have not been persuaded nor could I find convincing reasons from the record why this well-established principle should not be applied in this matter. Therefore, in view of the conclusions reached above, the applicant and the second respondent are awarded costs.

[97] Order

1. The applicant's non-compliance with the prescribed periods of time and forms of service, is hereby condoned and the matter is enrolled as one of urgency in terms of Rule 73 (3) of the Rules of this court.
2. It is declared that the agreement entered into between the applicant and the first respondent for the first respondent to provide ground handling services at Hosea Kutako International Airport ("HKIA") shall terminate on 30 June 2022 ("the termination date").

3. It is declared that the first respondent shall at the end of the day on the termination date:
 - 3.1 cease to provide ground handling services at HKIA;
 - 3.2 hand over all security access cards or other equipment entitling it to access HKIA or any premises which it occupies at HKIA by virtue of the ground handling services agreement with the applicant;
 - 3.3 vacate occupation of any premises at HKIA occupied by virtue of the ground handling services agreement.

- 4 If the first respondent refuses to give effect to the order set out in paragraph 3 above, then the Deputy Sheriff of this Court is directed to:
 - 4.1 evict the first respondent from HKIA and from all premises of HKIA occupied by the first respondent by virtue of the ground handling services agreement;
 - 4.2 remove all equipment belonging to the first respondent from the HKIA;

- 5 The order that the first respondent's counter-application is dismissed is varied in terms of rule 103(1) to read that the first respondent's counter-application is struck from the roll.

- 6 The first respondent is ordered to pay the applicant's costs of the application and opposition to the counter application and such costs to include costs of one instructing and two instructed Counsel; and further pay the second respondent's costs limited to the counter application which includes costs of two counsel.

- 7 The matter is removed from the roll and regarded as finalised.

O S SIBEYA
JUDGE

APPEARANCES:

APPLICANT: R Bhana SC, (with U Hengari)
Instructed by Shikongo Law Chambers.

FIRST RESPONDENT: R Heathcote SC, (with JP Jones)
Instructed by Viljoen & Associates

SECOND RESEPONDENT: S Namandje, (with K Gaeb)
Of Sisa Namandje & Co Inc