



NOT REPORTABLE

CASE NO: SA 48/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MENZIES AVIATION (NAMIBIA) (PTY) LTD

Appellant

and

NAMIBIA AIRPORTS COMPANY LIMITED

First Respondent

**PARAGON INVESTMENT HOLDINGS (PTY) LTD
JOINT VENTURE ETHIOPIAN AIRLINES**

Second Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 19 April 2023

Delivered: 9 June 2023

Summary: During 2014, the appellant (Menzies) and the first respondent – the Namibia Airports Company (the NAC) – entered into a written agreement to perform ‘ground handling services’ at the Hosea Kutako International Airport (the HKIA). This agreement was for an initial five years (the agreement commenced on 1 January 2014 and lapsed on 31 December 2021) – but it was subject to the right of renewal for three years. New bids were invited prior to the termination date for ground handling services at the HKIA. A six months extension was agreed to between the parties from January 2022 to 30 June 2022, subject to a month written notice of

termination should the procurement process (in terms of the Public Procurement Act 15 of 2015 for ground handling services at HKIA) that was pending at the time be finalised prior to the termination date. Both Menzies and the second respondent (Paragon) took part in the procurement process as bidders. Paragon's bid was successful. Menzies' bid was disqualified on the basis of non-compliance with certain tender conditions. Menzies took the matter to the Review Panel in terms of s 58 of the Public Procurement Act, but the review was dismissed during February 2022. Subsequently, the NAC, per letter dated 31 March 2022 gave notice of termination of the agreement between it and Menzies effective 30 April 2022. Menzies disputed the lawfulness of the notice and in a letter on 22 April 2022, the NAC withdrew its notice of termination and informed Menzies that they stood by the termination date of 30 June 2022 as provided for in the extension of the original agreement and asked for an undertaking by Menzies that it would vacate the NAC premises when the agreement between them expires (Menzies refused to give an undertaking to this effect). In the meantime, on 11 April 2022, Menzies launched a review application against the NAC and eight other respondents in which it took issue with the constitutionality of s 4(2) of the Public Procurement Act; that given the magnitude of the tender, the NAC acted *ultra vires* the powers granted to it to conduct the procurement process itself when it had to be dealt with by the Central Procurement Board of Namibia. On 27 May 2022, NAC launched an urgent application seeking a declaratory order that the agreement would terminate on 30 June 2022 and that Menzies would be obliged to, on that day, cease to provide services to NAC and give vacant occupation of the premises.

Menzies opposed the urgent application on the grounds that there was a tacit relocation of the agreement with the NAC pending its review application and it also launched a counter-application for the relief which Menzies stated amounted to a collateral challenge to the relief sought in the urgent application.

The High Court found in favour of the NAC and struck Menzies' counter-application from the roll.

On appeal, the appellant raised several grounds of appeal some of which related to the stay application and the failure to allow oral evidence and cross-examination –

these were not persisted with. What remained to be determined is the main application and the collateral challenge to it relating to the monetary threshold point raised as a ground of appeal. Whether it was necessary to join the Namibia Civil Aviation Authority (NCAA) in the main application. Whether there was a tacit relocation in respect of the ground handling agreement between the NAC and Menzies that entitled the latter to continue its occupation of the premises at HKIA so as to provide its services beyond June 2022. Whether the main application amounted to an abuse of process. And whether the threshold point amounts to a successful collateral challenge to the main application.

Held that, in terms of s 4(1) and 5(2)(a) of the Airports Company Act 25 of 1998, the NAC is in charge of the management and control of the HKIA and this capacity entitles it to enter into agreements with persons to render services that need to be performed at the HKIA on its behalf. The NCAA has no role in the appointment of a service provider by the NAC or to assist the latter with its functions and has no interest in such appointment save to ensure that, where applicable, such service provider renders such services on behalf of the NAC in conformance with the applicable civil aviation standards and procedures applicable to Namibia. The NCAA has no direct and substantial interest in who the NAC contracts with to render service on its behalf. The NCAA further has no direct and substantial interest in a dispute between the NAC and a potential service provider. The court *a quo* was correct to dismiss the non-joinder point.

Held that, whether the agreement between Menzies and NAC was tacitly relocated must be determined on the circumstances and facts of this matter and such relocation must arise unequivocally as an inference from such circumstances and facts. On the facts, Menzies did not accept that the notice of cancellation was valid. The reinstatement of the agreement was not done unilaterally as Menzies suggests in its answering affidavit – it was done with its consent or acquiescence as Menzies clearly accepted it as it was in line with their approach at the time that the cancellation was invalid and the agreement remained unaltered which was also evident from their conduct in seeking an extension of the agreement subsequent to the withdrawal of the cancellation. Further, Menzies did not discharge the onus on it to prove that the parties' conduct was to accept that the cancellation letter terminated

the agreement and that their agreement after the termination gave rise to an inescapable inference that the agreement was tacitly relocated. The evidence established is that a disputed cancellation was resolved by an agreement to proceed with the original agreement between the parties. The court *a quo* thus correctly dismissed the reliance on a tacit relocation agreement.

Held that, the collateral challenge is not the right remedy in the circumstances. The rule of law demands that Menzies' unlawful hold over the premises and forcing NAC to make use of its services should be put to an end. As Paragon was awarded the bid, and that award had not yet been set aside, it should be allowed to act in accordance with the bid as it is willing to do. The lawfulness or otherwise of the awarding of the bid falls to be decided in the pending review application in the High Court as this is where these matters are normally determined and there is nothing before court to indicate this will somehow run contrary to the rule of law.

The appeal is dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and HOFF JA concurring):

Introduction

[1] In terms of s 4(1) and 5(2)(a) of the Airports Company Act 25 of 1998, the Namibia Airports Company Ltd (the NAC) is in charge of the management and control of the Hosea Kutako International Airport (the HKIA) and in this capacity it is entitled to enter into agreements with persons to render services that need to be performed at the HKIA on its behalf. In addition it is also the owner of the airport.

[2] During 2014, the NAC entered into a written agreement with the appellant, Menzies Aviation (Namibia) (Pty) Ltd (Menzies) to perform 'ground handling services'

at the HKIA. The agreement was to be for an initial period of five years commencing on 1 January 2014. It had a renewal period of another three years which was implemented leading to a termination date of 31 December 2021. Prior to the termination date, new bids were invited in respect of the ground handling services at the HKIA. A further extension of six months up to 30 June 2022 was agreed to between the NAC and Menzies in January 2022, subject to a month's written notice of termination should the procurement process pending at the time be finalised prior to the said termination date. This procurement process was for ground handling services at the HKIA upon termination of the agreement with Menzies.

[3] The mentioned procurement process involved a public bidding process as required by the Public Procurement Act 15 of 2015 which also prescribed certain requirements relating to this process.

[4] Both Menzies and the second respondent (Paragon) partook in the procurement process as bidders. The bid of Menzies was disqualified on the basis of non-compliance with certain tender conditions and the bid of Paragon was accepted by the NAC. Menzies, aggrieved by its disqualification, took the matter to the Review Panel constituted in terms of s 58 of the Public Procurement Act but the review was dismissed by the Review Panel during February 2022.

[5] Per letter dated 31 March 2022, the NAC gave notice of termination of the agreement between it and Menzies effective from 30 April 2022. Menzies disputed the lawfulness of this notice and per letter dated 22 April 2022, the NAC withdrew the said notice of termination and informed Menzies that they stood by the termination date of 30 June 2022 as provided for in the extension of the original agreement.

[6] In the meantime, and on 11 April 2022, Menzies launched a review application against NAC and eight other respondents (including the Review Panel) taking issue with the constitutionality of s 4(2) of the Public Procurement Act and alleging that the magnitude of the tender was such that the NAC acted *ultra vires* the powers granted to it to conduct the procurement process itself when it had to be dealt with by the Central Procurement Board of Namibia. In addition it sought a review of the procurement process based, essentially on its disqualification as a bidder, and hence its exclusion from the evaluation of the bids.

[7] An undertaking was also sought in the letter of 22 April 2022 by the NAC from Menzies that the latter would vacate the premises of the NAC at the HKIA when the agreement between them expired through the effluxion of time and when Menzies refused to give such an undertaking the NAC launched an urgent application on 27 May 2022 seeking a declarator that the agreement would terminate on 30 June 2022 and that Menzies would be obliged to, on that day, cease to provide services to the NAC and give vacant occupation to it of the premises used by Menzies which they occupied to render the services pursuant to the agreement with the NAC.

[8] Menzies opposed this application essentially on the ground that there was a tacit relocation of its agreement with the NAC pending its review application and also launched a counter-application for relief which Menzies stated amounted to a collateral challenge to the relief sought in the urgent application. This counter-application included an application for an interim interdict allowing Menzies to continue to render the ground handling services pending the review application and averred that the value of the bid for the ground handling services was such as to fall

outside the statutory mandate of the NAC and that the central procurement board was the entity which had to conduct the whole bid process.

[9] The court *a quo* granted the orders sought by the NAC in its urgent application and struck the counter-application from the roll. This was mainly as a result of the court *a quo*'s finding that the Review Panel had to be joined as a party to the counter-application. In both instances an adverse costs order was granted against Menzies. Two notices of appeal were filed against the whole of the order of the court *a quo*.

[10] It is apposite at this stage to chronologically set out the litigation involved in this matter between the parties as this background is relevant to certain issues as will become apparent later in this judgment:

- (a) On 11 April 2022, Menzies launched a review application (the review application) against the decision by the NAC to award the ground handling services to Paragon. This review is currently pending in the High Court.
- (b) On 27 May 2022, the NAC launched the urgent application to declare that the ground handling services agreement with Menzies would terminate through the effluxion of time on 30 June 2022 and certain consequential relief (the main application).

- (c) On 15 June 2022 and via its opposing affidavit to the main application, Menzies answered the main application and raised its collateral challenge to it and also launched a counter-application.
- (d) On 29 June 2022, the High Court granted its order in respect of matters (b) and (c) above finding in favour of the NAC.
- (e) On 30 June 2022, Menzies filed its first notice of appeal. On 11 August 2022 the reasons for the orders by the High Court were provided and on 18 August 2022 a further notice of appeal was filed.
- (f) Subsequent to the judgment and order against it and sometime in October 2022 Menzies filed an application for an interdict *pendente lite* against NAC to allow it to stay on site and continue to render the ground handling services pending the finalisation of its review application launched on 11 April 2022 pending before the High Court.
- (g) On 24 February 2023, Menzies filed an application to adduce further evidence in this Court. A similar application was filed in the High Court in respect of the applications pending in that court. (The date when this was done is not clear as it does not appear from the record).

Notices of appeal

[11] Two notices of appeal were filed. This happened as the first one was filed prior to the reasons of the court *a quo's* orders being available and the second one

subsequent to the reasons being made available. The combined effect of the grounds of appeal in both notices are as follows:

- (a) The court *a quo* erred to not uphold a non-joinder point taken that the Namibian Civil Aviation Authority (NCAA) was a necessary party in respect of the main application.
- (b) The court *a quo* erred in not finding that Paragon was not capable of rendering the services it tendered for and not dismissing the evidence that Paragon spent nearly N\$6 million in preparation for the take-over from Menzies.
- (c) The court *a quo* erred in not finding in favour of Menzies that there had been a tacit relocation of the agreement that was supposed to terminate at the end of June 2022.
- (d) The court *a quo* erred in not deciding 'Menzies' counter-application for a stay', request for cross-examination or its collateral challenge. This is so for three reasons:
 - (i) The Review Panel was not a necessary party for the legal point raised by Menzies that the value of the tender was above the threshold for the NAC to conduct the procurement process which had to be done by the Central Procurement Board.

- (ii) The Review Panel was not a necessary party in respect of the application for a stay until the pending review in the High Court of the award of the bid to Paragon had been finalised.
 - (iii) No relief should have been granted prior to the cross-examination of some specified witnesses.
- (e) The court *a quo* erred in not finding that the main application amounted to an abusive process as relief was pursued so as to enable Paragon to obtain certainty as to its rights prior to spending money to ready itself for a take-over from Menzies.
- (f) That the orders declaring that Menzies should at the end of June 2022 cease to provide any services at the HKIA and grant the NAC vacant possession of the premises and authorising the intervention of the police should Menzies not vacate the HKIA was in breach of Namibia's international 'civil aviation' obligations.

What is before this Court?

[12] Counsel for Menzies conceded that the striking-off from the roll of the counter-application was not appealable without leave from the High Court and submitted with reference to the grounds of appeal that the counter-application was not the issue but the fact that the court *a quo* dismissed the collateral challenge which was a defence to the main application.

[13] The notices of appeal do raise grounds of appeal relating to the stay application and the failure to allow oral evidence and cross-examination. Counsel for Menzies however indicated that the issue relating to the cross-examination of witnesses would not be persisted with, nor was the ground relating to the stay application persisted with. The latter, in any event, would also have required leave from the court *a quo*. It follows that these two grounds of appeal are no longer of relevance to this appeal.

[14] It thus follows that what is before us is the main application and the collateral challenge to it relating to the monetary threshold point raised as a ground of appeal as set out above.

[15] The issue of the expenditure incurred by Paragon; its capacity to render the ground handling services and that the court orders authorised conduct that was contrary to Namibia's international obligations are also not before us. The issues relating to Paragon's ability to perform the tendered services forms part of the factual matrix in relation to the counter application and is no longer relevant as part of the collateral challenge. It must however be considered in relation to the point taken as to the non-joinder of the NCAA. Likewise the role of international aviation practices and procedures applicable to Namibia are to be taken into account in regard to this non-joinder point but there is no suggestion in the papers or in the heads of argument that the orders granted *a quo* are somehow in breach of any international agreements and this ground of appeal also requires no further discussion.

[16] It follows that the matters that need to be determined by this court, after taking into account what is stated above are the following:

- (a) Was it necessary to join the NCAA in the main application?
- (b) Was there a tacit relocation in respect of the ground handling agreement between the NAC and Menzies that entitled the latter to continue its occupation of premises at the HKIA so as to provide its services beyond June 2022?
- (c) Did the main application amount to an abuse of process?
- (d) Does the threshold point amount to a successful collateral challenge to the main application?

Non-joinder of the NCAA

[17] As already indicated in the introduction, the NAC is charged with the management, control or operation of the HKIA and may render any 'service . . . normally related to the functioning of an aerodrome'. In addition to this, the NAC is enjoined to 'ensure that every relevant activity is carried on in conformity with applicable international standards and recommended practices'¹ which per the definition section includes standards and procedures adopted by the International Civil Aviation Organisation (ICAO).

¹ Section 5(1)(b) of the Airports Company Act 25 of 1998.

[18] To assist the NAC to fulfil its tasks it may 'enter into an agreement with any person . . . to render a particular service . . . it is required or entitled to provide or render, but any such contract shall be consistent with the objects of the [NAC]'.²

[19] It follows from what is stated above that the NAC is the entity that must act in accordance with the provisions of the Airports Company Act and where it appoints someone in terms of an agreement to render services on its behalf, the NAC must ensure that the rendering of such services is of the requisite standard. This is so because these services are rendered on 'behalf of or in favour of [the NAC]'.³

[20] The NCAA in turn ensures that the NAC ensures a safe and secure environment in respect of civil aviation in compliance with ICAO standards and procedures and other international civil aviation agreements applicable to Namibia. The NCAA in general regulates and monitors adherence to the aviation standards and practices in Namibia from a safety and security point of view and in this manner supervises the activities of the NAC and any other person operating at or from an airport. Thus, if a service provider of the NAC operates in a manner that is not in accordance with the standards or procedures stipulated by the NCAA it will take this up with the NAC to resolve as the relevant service provider acts on behalf or in favour of the NAC. If the service provider transgresses in respect of some legal requirements such provider is also accountable. In essence however the NCAA through its role ensures compliance with procedures and standards by the NAC who in turn must ensure such compliance by its service providers. In fact, these standards and procedures which are legally enforceable will also form implied terms

² Section 5(2)(a) of the Airports Company Act.

³Section 5(2)(a) of the Airports Company Act.

of any agreement reached between the NAC and such service provider where such terms are not expressly mentioned in the agreement with such service provider.

[21] The NCAA has no role in the appointment of a service provider by the NAC to assist the latter with its functions and has no interest in such appointment save to ensure that, where applicable, such service provider renders such services on behalf of the NAC in conformance with the applicable standards and procedures. The role of the NCAA in this context is in essence a post appointment supervisory one. The role of the NCAA is to supervise and police all involved in civil aviation after they become involved so as to ensure adherence to the stipulated practices and procedures. They do not have any role in deciding who should become involved in civil aviation in whatever role in the sense that they have a say in who the NAC must appoint as service providers.

[22] In short, they have no direct and substantial interest in who the NAC contracts with to render any service on its behalf. Their role only comes into play subsequent to such appointment to ensure such contractor on behalf of the NAC adheres to the relevant aviation requirements. The NCAA has no direct and substantial interest in a dispute between the NAC and a potential service provider to it. They simply continue to supervise and regulate the NAC and in this manner enforce compliance with aviation standards irrespective of which service provider is used by the NAC save to the extent that where a service provider itself contravenes these ICAO requirements they can also act against such service provider.

[23] It follows that the court *a quo* correctly dismissed the non-joinder point raised on behalf of Menzies.

Tacit relocation

[24] The court *a quo* held that on the facts a tacit relocation was not established and that the parties adhered to the written agreement that provided for termination through the effluxion of time at the end of June 2022. It is thus apposite that the factual matrix in this regard be stated in some detail.

[25] The NAC and Menzies entered into a written agreement for the latter to render ground handling services for the former at the HKIA during January 2014. This agreement which was to endure for 60 months contained a non-variation clause which, amongst others, provides that a 'revival' of the agreement would not be of any force or effect unless reduced to writing and signed by the parties.

[26] In a written addendum to the aforesaid agreement it was extended for three years with effect from 1 January 2019. A further (second) written addendum entered into in January 2022 extended the agreement to 30 June 2022. When this latter extension was agreed to, a public procurement process to find a suitable person or entity to render the ground handling services to the NAC in future was in the process of being finalised. As already mentioned both Menzies and Paragon partook in this process. As is evident from para 3.2 of the second addendum it was entered into pending the finalisation of the procurement process. Paragraph 3.2 reads as follows:

'This 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, which would ordinarily be the case if the procurement process pertaining to the subject-matter of the Agreement is completed prior to effluxion of the aforesaid 6 months' period – as a review application vis-à-vis same is presently serving before the Review Panel'

[27] On 31 March 2022, the NAC gave Menzies one month's notice of cancellation of the agreement with effect from end of April 2022. On 11 April 2022 (the same day the review application by Menzies was launched), Menzies responded to the cancellation of the contract by the NAC as follows:

'We have launched a review application with the High Court of Namibia, the documents whereof will be served forthwith.

We consider the cancellation of the ground handling agreement/licence to be unconstitutional and ultimately unlawful, notwithstanding that it is also reviewable.

In the light of this, our client continues providing ground handling services and will resist any attempt by NAC to evict it.'

[28] The NAC responded per letter of 13 April 2022 noting that Menzies was insisting that it will continue to render services despite cancellation of the agreement per the letter of 31 March 2022 and insisted that it expects Menzies to co-operate with the hand over to Paragon in May 2022.

[29] The NAC for reasons unknown (according to Menzies this was because Paragon was not ready to take over the services from Menzies on 1 May 2022) had a change of heart in respect of the cancellation contained in the letter of 31 March 2022.

[30] In a letter dated 22 April 2022, the NAC withdrew its letter of 31 March 2022 and reiterated that the agreement was to terminate on 30 June 2022 and sought confirmation from Menzies that it would vacate the premises on that day and arrange 'for a smooth hand-over to the successful bidder'. On the same date a letter was forwarded to stakeholders by the NAC informing them that Menzies would 'continue to render ground handling services' whereafter Paragon would take over those services.

[31] On 25 April 2022, Menzies responded to the letter of 22 April 2022 from the NAC. Menzies alleges that it was common cause that Paragon would not be capable of rendering the ground handling services and it was this that forced the NAC's 'withdrawal of its cancellation letter of 31 March 2022 and requesting our client to provide such services until 30 June 2022'. The letter ends with the following two paragraphs:

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

Such decision will be in the interest of the stakeholders involved.'

[32] Subsequent to this letter, the NAC sought an undertaking from Menzies that it will indeed vacate the premises on 30 June 2022 and assist in a smooth hand-over to Paragon of the ground handling services. It required a number of letters to elicit a response from Menzies which finally came on 23 May 2022. It suggested that Menzies signed the second addendum under duress at the time as their 'dangerous goods handling certificate' was about to expire and the addendum was placed before

it without prior negotiations for signature. It then refers to the letter dated 15 April 2022 from the NAC to aver that it was then (ie 23 May 2022) 'most definitely' not rendering services in terms of the extension of the agreement provided for in addendum two and denied that this addendum was applicable and that the agreement in terms whereof it was rendering services to the end of 30 June 2022 was still in place. It thus refused to give the undertaking sought by the NAC to vacate the premises and hand over the ground handling services to Paragon.

[33] With the confirmation that Menzies would not recognise the termination date agreed to in the second addendum the NAC launched the main application on an urgent basis on 27 May 2022.

[34] Whether the agreement between Menzies and the NAC was tacitly relocated as submitted on behalf of Menzies must be determined on the circumstances and facts of this matter and such relocation must arise unequivocally as an inference from such circumstances and facts.⁴ As put by Damaseb JP (as he then was) in *Kalipi Ngelenge t/a Rundu Construction v Anton E van Schalkwyk t/a Rundu Welding & Construction*⁵ in connection with a lease agreement:

'A tacit relocation of an agreement is said to arise where parties [ie both 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 825 D-E. An essential prerequisite of a relocation of a lease is that it must be

⁴ *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236 (C) para 32.

⁵ *Kalipi Ngelenge t/a Rundu Construction v Anton E van Schalkwyk t/a Rundu Welding & Construction* 2010 (2) NR 406 (HC).

unequivocally inferred from the conduct of the parties [ie both parties] that a renewed or new lease had come into effect.’⁶

[35] I think it is quite clear from the correspondence above that the NAC was under the impression that despite its attempt to cancel the agreement per letter dated 31 March 2022 which was not given effect to, the original agreement with an expiry date of 30 June 2022 was still in place when it launched the main application. All its letters subsequent to the withdrawal of the attempt to terminate the agreement at the end of May 2022 testifies to this fact. What was sought in its correspondence was an undertaking from Menzies to adhere to its obligations in respect of the termination date of 30 June 2022. The conduct of Menzies certainly does not give rise to an inescapable inference that both the parties desired the revival of a prior cancelled agreement until the finalisation of the review application of Menzies.

[36] When regard is had to the original agreement entered into during 2014 and the clause requiring any ‘revival’ to be in writing which is quoted above and which was retained in both the addendums of 2019 and 2022 what are the chances that the NAC would tacitly agree to a further extension or ‘revival’?

[37] Menzies latches on to the termination of the agreement contained in the letter of 31 March 2022 by the NAC to it giving it the required one month notice as stipulated in the second addendum for termination of the agreement. Thus the position is summarised in the answering affidavit to the main application as follows:

‘Addendum two was unilaterally terminated – as it was entitled to do – by NAC on 31 March 2022 . . . But it was not entitled to unilaterally revoke the letter of termination.

⁶ *Supra* para 12.

The original agreement, as intended, came to an end on 30 April 2022 (by notice given by NAC on 31 March 2022). Thereafter it was relocated and are still of full force and effect. The attempt by NAC to withdraw its termination notice is not permissible in law. Agreements are not rendered, are not concluded or reinstated unilaterally. They can only be done by consensus. I submit it is trite that once an agreement had been cancelled it cannot be 'uncancelled' as NAC attempted to do.'

[38] The above submissions fail to take cognisance of the facts which demonstrate the attitude of the parties at the time. Firstly, Menzies did not accept the cancellation but disputed it averring it was unconstitutional, unlawful and liable to be set aside on review. They thus insisted that the agreement was not cancelled and had to be adhered to. If they thought that it was validly cancelled, as belatedly suggested when faced with an eviction application, on which basis did they stay on and insisted to render services provided for in the agreement? Was this, too by stealth, an attempt to establish a tacit relocation? I must say that their stance when pressed to give an undertaking to honour the expiry date of the agreement and their omission to mention the reliance on a tacit relocation expressly prior to filing their answering affidavit suggested this might have been a stratagem to attempt to create a defence to the main application that they knew was eminent. Secondly, when NAC withdrew the notice of termination there was no suggestion at the time that this could not be done. This was after all, in their mind at that stage, the proper thing to do and not to persist with an unconstitutional and unlawful notice which by necessary implication was of no effect. Thirdly, not only did Menzies not react negatively to the withdrawal of (what they thought was a nullity) they used the opportunity to attempt to persuade NAC to extend the termination date of 30 June 2022 to an indefinite date, ie pending the termination of their review application.

[39] On the facts Menzies thus did not accept that the notice of cancellation was valid as suggested in the answering affidavit. They maintained the opposite. Furthermore, the reinstatement of the agreement (if it was in fact reinstated) was not done unilaterally as suggested in the answering affidavit. It was done with the consent or acquiescence of Menzies who clearly accepted it as it was in line with their approach at the time that the cancellation was invalid and that the agreement remained unaltered which is also evident from their conduct in seeking an extension of the agreement subsequent to the withdrawal of the cancellation.

[40] The upshot of the above is that Menzies did not even come close to discharging the onus on them to prove that the parties' conduct was such as to accept that the cancellation letter terminated the agreement and that their conduct after the termination of the agreement was such to give rise to an inescapable inference that the agreement was tacitly relocated. The evidence established that from the perspective of the parties a disputed cancellation was resolved by an agreement between them to proceed with the original agreement. The court *a quo* thus correctly dismissed the reliance on a tacit relocation of the agreement by Menzies.

Abuse of process

[41] The court *a quo* granted a declaratory order and as pointed out on behalf of Menzies such orders are discretionary. According to Menzies the court *a quo* should have declined to exercise its discretion in favour of Paragon as the application of the NAC amounted to an abuse of process as, according to Menzies, the NAC brought the application to enforce Paragon's rights with a court order in its favour and to give

them security in respect of the expenses they would have to incur in the take-over process from Menzies.

[42] In the heads of argument on behalf of Menzies the rhetoric against the NAC is ramped up and it is submitted as follows:

'Here importantly, it was not the winning "party"; Paragon, who brought the application. Strangely enough it was NAC. Why on earth would a parastatal spend money to assist a successful tenderer to invade the airport?'

[43] Nothing more needs to be said on the above point as it is so lacking in merits that I am surprised that it was persisted with in this Court. The NAC awarded a contract to Paragon and for Paragon to be able to render its services, it had to be given access to the premises at the HKIA. NAC was contractually bound to give them that access. In addition, the NAC is the owner of the HKIA and must render the services there in this regard which it decided to do through the agreement with Paragon. The NAC was thus the natural party to bring the proceedings. To suggest that it would assist an 'invasion' of the airport is clearly misplaced. The entity, which unlawfully refused to vacate the premises and in this sense invaded the rights of the NAC, and can hence arguably be described as an invader, is Menzies. The latter stayed on without any right whatsoever and refused to vacate on the basis of a fabricated defence based on a tacit relocation of an expired agreement.

Collateral challenge

[44] This challenge was raised in the answering affidavit which also served as the founding affidavit for the counter-application which in essence was to review the decision to award the tender to Paragon with alternative relief for an interim interdict,

a stay pending the finalisation of the review application and further alternatively the calling of certain witnesses for cross-examination. As mentioned earlier the counter-application is not relevant to the appeal as it was struck from the roll and leave was not obtained to appeal this order insofar as it was appealable.

[45] Counsel for Menzies submits however that the point raised in respect of the threshold that was exceeded for tenders by the NAC as the process had to be conducted by the Central Procurement Board and not the NAC is such to constitute a successful collateral challenge. According to the submissions on behalf of Menzies, this means that the whole bidding process was a nullity and has to be set aside.

[46] Before I deal with the above aspect the factual position should briefly be stated. Firstly, Menzies had no right to remain on the premises of the HKIA and render the ground handling services after the expiry of the agreement to this effect on 30 June 2022. It nevertheless simply refused to vacate the premises nor did they obtain any relief from a court of law entitling them to stay there. They rely on unlawful self-help to stay put and had to date hereof occupied the premises unlawfully for about a year. Secondly, Paragon presently has the right in accordance with a bid awarded to it by the NAC to be placed in possession of the premises so as to render the services pursuant to the bid awarded to it. Thirdly, Paragon is a party to the review application currently serving in the High Court in which Menzies is seeking to review the decision of the NAC to award the bid to Paragon. Fourthly, Paragon is also a party to an application for an interim interdict pending in the High Court to allow Menzies to continue with the rendering of services pending the finalisation of

the review application against the award of the tender to Paragon. Fifthly, despite the pending litigation, Paragon is prepared to commence with the agreement awarded to it, ie it is prepared to run the risk that the award to it may be set aside or that Menzies may be successful with its application for an interim interdict. Sixthly, Menzies in the review application seeks an order to set aside the decision to disqualify them because not all the pages of their bid were initialled and their registration documents were not fully certified. Should Menzies be successful with the relief it means that their bid would have to be considered. It does not necessarily follow that they would be awarded the bid. In the papers *a quo* there are statements that if the bid is considered they will be the successful tenderer and they intend to amend the relief sought in the review application in this regard because it is not currently part of such relief. Whether this amendment has been moved or is in the process of being moved has not been stated. This is however not the standard order and certainly no evidence was put up to suggest that this would be the inevitable outcome. Seventhly, the ground handling services at the HKIA is a continuing service which should continue without interruption as without it the country's premier international airport would be severely impacted. Eighthly, the declarator sought by the NAC was primarily to ensure that Menzies vacate the premises of the HKIA on the expiry of the agreement between them. The fact that they asked for an order that Menzies take all steps necessary to enable Paragon to commence with the ground handling services was ancillary to the declarator relating to the termination of the agreement.

[47] What we are faced with is Menzies who resorted to self-help to remain in possession of the premises and hence, because of the necessity of the services, is

in essence blackmailing the NAC, to use them in the meantime. On the other hand it is Paragon who has been awarded the agreement and which award, although subject to review, has not yet been set aside, who is willing to perform in terms of this award granted to it even with the risk that it may be set aside.

[48] Furthermore, even if the threshold point is a good one and will lead to the whole bidding process being set aside this does not mean that Menzies is entitled to render the ground handling services as their contract has expired, ie the NAC will sit without a ground handler. This position is clearly to be avoided if possible.

[49] The threshold point is also raised in the proceedings currently before the High Court and for the reasons mentioned below it is not necessary for this court to decide. It would thus have to be dealt with by the High Court in due course. I will however assume for the purposes of this judgment that it is a good point.

[50] As pointed out above, even if the threshold point succeeds it will not raise a defence against the declarator and the order for Menzies to vacate the premises. It does not raise a defence against the main relief sought but can only effect the ancillary relief to hand-over to Paragon. It is thus in my view not the right remedy in the circumstances as the rule of law demands that Menzies' unlawful holding over the premises and with this practically forcing the NAC to make use of its services be put to an end⁷. As Paragon was awarded the bid, and that award has not yet been set aside, it should be allowed to act in accordance with the bid as it is willing to do. The lawfulness or otherwise of the awarding of the bid falls to be decided in the

⁷ *Black Range Mining (Pty) Ltd v Minister of Mines & Energy & others* NNO 2014 (2) NR 320 (SC) para 20.

pending review application in the High Court as this is where these matters are normally determined and there is nothing before court to indicate this will somehow run contrary to the rule of law.

[51] Lastly, it must be stated that nothing in this judgment will prevent any party from seeking interlocutory relief pending the review application as to the rendering of the ground handling services at the HKIA. In fact, it is surprising that this has not yet been done although there was an attempt in this matter which was not successful on behalf of Menzies. As mentioned, there is currently such an application by Menzies and this application will have to be dealt with in accordance with the normal legal requirements and principles applicable to such applications. This will obviously also apply to any further interlocutory procedures.

[52] For the above reasons the collateral challenge fails.

Application to adduce further evidence

[53] An application to file further evidence was launched and was set down on the same date the appeal was heard. A similar application was launched at the High Court in respect of the pending matters there between the parties.

[54] The new evidence sought to be introduced deals with the alleged shortcomings in the bid of Paragon and in this manner seeks to further attack the award of the bid to it. As is evident from what is stated above the review and interlocutory interdict applications are pending in the High Court and the new evidence may be relevant to these proceedings but it certainly is not relevant to

anything this Court has to decide. A counter application, to which it may have been of some relevance, was struck from the roll by the court *a quo* and there was no appeal in respect of that order to this Court. In respect of what remained before this Court the attack on the bid of Paragon could not be taken further than it already was with yet more evidence criticising the award to Paragon. It could not affect the main issue, namely the continued occupation by Menzies of the premises at the HKIA one iota.

[55] A large part of the new evidence sought to be introduced was not evidence at all but argument under oath. To point out discrepancies in signatures between a number of copies of Paragon's bid discovered by the NAC does not amount to evidence. The copies themselves are evidence but to simply refer to discrepancies apparent from those copies can be done at the hearing of the matter by counsel as the copies of the record are before court. To do this under oath does not elevate argument to evidence.⁸ Be that as it may, the evidence relating to the alleged forgery of signatures on Paragon's bid is something else and may be a legitimate reason for an application for further evidence provided it passes the test for admission at this stage of the proceedings in the High Court which is for the High Court to decide.

[56] It follows that the application for the adducing of further evidence in this Court fails.

Conclusion

[57] It follows from what is stated above that the appeal cannot succeed and that the application to adduce further evidence in this Court falls to be dismissed. As far as the costs are concerned there was no submission on behalf of any party that the

⁸ *Minister of Basic Education, Sport and Culture v Vivier NO & another* 2012 (2) NR 613 (SC) para 21.

normal costs order would not be appropriate in this matter and I agree. Further there was also no dispute that the costs order should include the costs of one instructing and two instructed counsel where utilised given the voluminous nature of the matter and the complexity of the issues raised. This was indeed a case where the use of two instructed counsel was warranted and reasonable.

[58] In the result, I make the following order:

1. The appeal is dismissed with costs.
2. The application to adduce new evidence is dismissed with costs.
3. The costs referred to above shall include the costs of one instructing and two instructed legal practitioners in respect of first respondent and the costs of one instructing and one instructed legal practitioner in respect of second respondent.

FRANK AJA

MAINGA JA

HOFF JA

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