

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title:	Case No:
Menzies Aviation (Namibia) (Pty) Ltd Applicant	HC-MD-CIV-MOT-REV-2022/00155
and	Division of Court:
Namibia Airports Company Ltd 1 st Respondent	Main Division
Paragon Investment Holdings (Pty) Ltd 2 nd Respondent	Heard on:
JV Ethiopian Airlines	28 June 2023
Skye Aviation Services (Pty) Ltd 3 rd Respondent	
Namibia Flight Support CC	
JV Equity Aviation 4 th Respondent	
Kings Ground Airport Services (Pty) Ltd 5 th Respondent	
Menell Investment CC JV NAS 6 th Respondent	
Central Procurement Board of Namibia 7 th Respondent	
Chairperson of the Review Panel 8 th Respondent	
Government Attorney 9 th Respondent	
Government Attorneys 10 th Respondent	
Heard before:	Delivered on:
Honourable Lady Justice Rakow	5 July 2023
Neutral citation: <i>Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd</i> (HC-MD-CIV-MOT-REV-2022/00155) [2023] NAHCMD 378 (05 July 2023)	
Order:	
1. Leave to appeal is granted against this court's order to dismiss the application for a <i>pendente lite</i> interdict.	
2. Costs of this application shall be costs in the appeal.	

Reasons for order:

RAKOW J

Background

[1] The applicant was rendering ground-handling services to the first respondent at Hosea Kutako International Airport as per an agreement between the applicant and the first respondent. According to the first respondent, that agreement came to an end on 30 June 2022. The first respondent then sought the applicant's urgent ejection, which order was granted and is appealed against. The appeal was subsequently dismissed.

[2] The applicant in the meantime approached this court with a *pendente lite* interdict application wherein it seeks undisturbed further permission to render the ground-handling services at the Hosea Kutako International Airport pending the finalization of the review process which includes possible appeal to the Supreme Court of the outcome of the said review process.

[3] Before this court now, is an application for leave to appeal the Court's refusal to grant the *pendente lite* interdictory relief, and the application for leave to appeal is opposed by both the first and second respondents.

Arguments by the parties*The applicant*

[4] On behalf of the applicant, it was argued that the court could not have known what the order of the Supreme Court in the Sibeya J judgements' Appeal would be. The Supreme Court did ultimately hold that:

'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. 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.¹

[5] It then follows, that in as far as the application was dismissed, first and foremost because of the pending appeal and a possible contradictory result, this issue has been dealt with finally by the Supreme Court and on that score, and although this court is not to be blamed, the Supreme Court's finding itself provides ample proof that there are more than reasonable prospects of success on appeal.

[6] It was further argued that the respondents if they wanted to rely on delay, had to pertinently plead (and prove) the defence of delay while attracting the full onus of alleging and proving that the delay was unconscionable, and that the enforcement of the right sought by the applicant would be an act of bad faith and cause great inequity. A mere delay in applying for an interdict in defence of a right is no grounds for refusing the interdict.

[7] The Court erred on the facts and/or the law in concluding that the application *pendente lite* lacked bona fides. In coming to this conclusion, the court not only erred on the facts and the law but also caused an irregularity in the proceedings to occur as envisaged in section 16 of the Supreme Court Act, and more particularly as a result of the following: Lack of bona fides were not alleged or proven by any of the respondents and therefore the finding of the court that the application "lacks bona fides" constituted an irregularity in the proceedings in the true sense of the word as described by the Supreme Court in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others*.²

[8] It was further argued that when the court found (in paragraph 53) that 'a year later is simply too long a period from bringing the review application to instituting the *pendente lite* application', this finding is factually wrong as the review application was instituted on 11 April 2022, while the *pendente lite* application was instituted on 21 October 2022. This constituted a vitiating error, also because it ignores the fact of the delay in finalising the filing of the record

The first respondent

[9] On behalf of the first respondent, it was argued that in his judgment of 29 June 2022, Sibeya J noted the clear duty of any litigant challenging a decision to institute its review without

¹ *Menzies Aviation (Namibia) Pty Ltd v Namibia Airports Company and Another* - case no: SA 48/2022 Delivered 9 June 2023.

² *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC).

delay, and more importantly that any litigant who does not seek to interdict an award, does so at their peril. That is the fate that befell the applicant. This court's judgment on this score cannot be faulted as it reflects clear authority both of this court and the Supreme Court. This is because the applicant waited six months after instituting its review to seek an interim interdict pending the review. At the time when the applicants' application *pendente lite* was heard on 24 April 2023, the contract between the first respondent and second respondent had endured for 14 months. The compounded delay by the applicant to bring an interim interdict pending the review is a matter of significant importance to a discretionary remedy like an interim interdict, and this the court took into account.

[10] The applicant has not shown that it had a clear right or at least a prima facie right to the effect that the current status quo be maintained until the pending review in the High Court (or the appeal in the Supreme Court of Namibia) has been brought to finality. Based on the further finding of the Supreme Court it is clear that the applicant has not demonstrated that it has a prima facie right or a clear right to remain at HKIA and to insist on rendering ground handling services at HKIA. This too was properly confirmed by this Court when it found that: 'The court finds that the interpretation by the first respondent is the most probable interpretation and that no new agreement came into place.' No other court will come to another conclusion on this. This court's approach was cautious and sensible, in view of what the Supreme Court subsequently found.

[11] It was also argued that this Court's conclusion that the application lacked bona fides was correct, in that Menzies never put up any facts to explain why it delayed in launching the *pendente lite* application, which as this Court reasoned: 'this application must be brought as soon as possible'. There were simply no other facts placed and pleaded before this court for the court to hold otherwise.

The second respondent

[12] On behalf of the second respondent, it was argued that they make submissions that the court properly exercised its discretion and applied correct legal principles. There are therefore no reasonable prospects of success if Menzies were to be granted leave to appeal. They further argued that the applicant must have been aware during December 2021, that should it not bring an application to stay the award made in favour of the second respondent then by operation of s 59(2) of the Public Procurement Act 15 of 2015, the award would be operative and of full effect.

Having failed to protect its rights then it deserves no protection by this court at this stage.

[13] It was submitted that the applicant did not seek, at its peril, an interim interdict *pendente lite* at that point. Two courts (Sibeya, J and this court) had since conclusively found that the applicant had unreasonably delayed bringing this application. This was the discretionary finding by courts in two separate hearings. It was also argued that the discretion the court has in that respect is a discretion in the 'strict' and 'narrow' sense. The Supreme Court can therefore only interfere if the court's discretion was capriciously exercised or based upon a wrong principle, or the court has not brought its unbiased judgment to bear on the question or the court has not acted for substantial reasons. None of these grounds are present in this case.

[14] On the submissions by the applicant's counsel in their heads of argument in relation to a sentence in the Supreme Court judgment on a possibility for it to approach this court must fail for many reasons including -Firstly, the Supreme Court statement was obiter as it was not necessary to the ratio behind the decision to dismiss that appeal. Secondly, the Supreme Court did not express a view on whether or not such an interim interdict will be good or bad. The applicant, with respect, reads too much into an almost empty statement in the judgment of the Supreme Court. The same judgment has affirmed the applicant to be an unlawful invader of the Airport. The same judgment conclusively confirms that the second respondent must be allowed to provide its services. The same judgment confirms that the applicants' right to provide services had long expired. And the same judgment states that even if the applicant were to succeed in the review it does not necessarily mean it must be awarded the bid

Legal Considerations and Conclusions

[15] The court first needs to decide whether the current order is indeed an appealable order as contemplated in s 18(3) of the High Court Act, 16 of 1990. This section reads as follows:

'(3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.'

[16] In deciding whether an order or judgement is appealable, in the *Di Savino v Nedbank Namibia Ltd*³ matter, Shivute CJ referred to the three attributes that must be present to identify

³ *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).

an appealable judgement or order as follows:

'The three attributes counsel for the appellant referred to are those set out in the decision of the South African Appellate Division in *Zweni v Minister of Law and Order 1993 (1) SA 523 (AD)* and as endorsed in many judgments of this court, namely that (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance; (ii) it must be definitive of the rights of the parties, ie. it must grant definite and distinct relief, and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings

[17] Applying the above to the current matter before the court, the court finds that the dismissing of the *pendente lite application* in this instance indeed meets the three attributes as set out in the *Zweni* matter and is therefore an appealable order.

[18] The test to be applied on whether leave to appeal should be granted, the following was stated by this court in *African Selection Trust SA v Namsov Fishing Enterprises (Pty) Ltd*:⁴

'In terms of the applicable test, the court will now have to determine whether or not there is a reasonable possibility that the Supreme Court may come to a different conclusion.'

[19] After hearing and considering the arguments, this court is of the opinion that the Supreme Court may come to a different conclusion as to what this court came to, and for that reason, the application for leave to appeal must be successful.

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

1. Leave to appeal is granted against this court's order to dismiss the application for a *pendente lite* interdict.
2. Costs of this application shall be costs in the appeal.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable

⁴ *African Selection Trust SA v Namsov Fishing Enterprises (Pty) Ltd* (HC-MD-CIV-ACT-CON-2016/03860) [2017] NAHCMD 363 (17 November 2017).

Counsel:	
Applicant:	First Respondent:
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	Second Respondent:
	S Namandje Of Sisa Namandje & Co. Inc., Windhoek