

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2023/00256

In the matter between:

MENZIES AVIATION (NAMIBIA) (PTY) LTD

APPLICANT

and

NAMIBIA AIRPORTS COMPANY LIMITED

1st RESPONDENT

PARAGON INVESTMENT HOLDINGS (PTY) LTD

JV ETHIOPIAN AIRLINES

2nd RESPONDENT

SKYE AVIATION SERVICES (PTY) LTD

3rd RESPONDENT

NAMIBIA FLIGHT SUPPORT CC JV EQUITY AVIATION

4th RESPONDENT

KINGS GROUND AIRPORT SERVICES (PTY) LTD

5th RESPONDENT

MENNEL INVESTMENT CC

6th RESPONDENT

CENTRAL PROCUREMENT BOARD OF NAMIBIA

7th RESPONDENT

CHAIRPERSON OF THE REVIEW PANEL

8th RESPONDENT

MINISTER OF FINANCE

9th RESPONDENT

THE ATTORNEY GENERAL

10th RESPONDENT

DEPUTY SHERRIFF FOR DISTRICT OF WINDHOEK

11th RESPONDENT

MINISTER OF SAFETY AND SECURITY

12th RESPONDENT

NAMIBIAN CIVIL AVIATION AUTHORITY

13th RESPONDENT

CALISTA GOABAS

14th RESPONDENT

ARON KAURISA

15th RESPONDENT

EXECUTIVE DIRECTOR OF THE NAMIBIAN

CIVIL AVIATION AUTHORITY

16th RESPONDENT

Neutral Citation: *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Limited* (HC-MD-CIV-MOT-GEN-2023/00256) [2023] NAHCMD 485
(8 August 2023)

Coram: UEITELE J
Heard: 4 July 2023
Order: 8 August 2023

Flynote: Civil law — Interdict – Stay of execution — Distinction between an interdict and a stay of execution *pendente lite* — Interdict is an injunction — Stay of execution is court order to temporarily suspend the execution of a court judgment.

Law of contract — Reasonable period of notice 30 days — What constitutes a contract — Contract is often defined merely as an agreement made between two or more persons with the intention of creating a legally binding obligation.

Summary: This is an application brought by Menzies after the Supreme Court handed down its judgment on 9 June 2023, in which it dismissed Menzies' appeal, against the orders and judgment of Justice Sibeya dated 29 June 2022 and the reasons that were handed down on 11 August 2022.

On 30 June 2022, after Justice Sibeya's judgment, the Airports Company issued a notice to all stakeholders that Menzies would continue to provide ground handling services at HKIA until further notice. However, on the day (that is on 9 June 2023) that the Supreme Court handed down its judgment the Airports Company gave Menzies notice to cease rendering ground handling services and vacate HKIA by 13 June 2023 on a 4 days' notice.

On 12 June 2023 Menzies filed an urgent application, to be heard on the same day, which was opposed by both the Airports Company and Paragon. On 15 June 2023, I found the application to be urgent and suspended the orders issued by Justice Sibeya pending the determination of the dispute under this application. The respondents were further granted leave to file their answering affidavits on 23 June 2023 and Menzies to file a replying affidavit on 26 June 2023.

Menzies is seeking the stay of execution of the orders granted by Justice Sibeya on the basis that; one, it has met the requirements of an interim interdict, that the award of the tender to provide ground handling services to Paragon by Airports Company was patently unlawful; and, two, the judgment or orders to evict Menzies from the HKIA were made redundant by the agreement of 30 June 2023 between the Airports Company and Menzies. It is against this backdrop that this court has to determine whether Menzies is entitled to a reasonable notice to cease rendering the ground handling services at the HKIA and to vacate the airport and whether the eviction orders of Justice Sibeya of 29 June 2022 are no longer operational.

I find that the notice of 9 June 2023, is not reasonable, and is set aside. Taking into account the notice periods contained in the contracts between the parties which contracts have now terminated by effluxion of time, I further find that a reasonable period of notice is 30 days.

I further find that the Airports Company on 30 June 2022, by its notice to all stakeholders agreed to create legally binding obligations between it and Menzies and is bound by its undertaking or agreement until when they have performed in terms of that agreement. It thus follows that the Airports Company cannot terminate and evict Menzies from HKIA on the basis of the contract which terminated on 30 June 2022. It furthermore follows that if the Airports Company cannot evict Menzies on the basis of the contract that terminated on 30 June 2022, I cannot order a stay of the order of 29 June 2022.

Held, that an interdict is an injunction. It is a remedy by a court, either prohibiting somebody from doing something (prohibitory interdict), or ordering him to do or carry out a certain act (mandatory interdict). Stay of execution on the other hand (which stems from the Latin term “*cesset execution*” which means let execution cease) is a court order to temporarily suspend the execution of a court judgment or other court order.

Held, that in order to determine what is reasonable within a given factual context one must have regard to the full spectrum of the relevant facts and circumstances that bear on the matter in issue.

Held, that a reasonable notice must allow the person to whom such notice is given, in this case Menzies, sufficient time in which reasonably to regulate its own affairs.

Held further, that a contract is often defined merely as an agreement made between two or more persons with the intention of creating a legally binding obligation or obligations.

Held further, that once parties have agreed to create legally binding obligations they will be bound by the agreement until when they have performed in terms of the agreement. In contract there is a time when, or a period within which performance is due. It thus follows that failure to perform at the time when or during the period within which performance is due, without lawful excuse, is a breach of contract because it is failure to do what one has contracted or promised to do.

ORDER

- 1 It is declared that the notice which the Namibia Airports Company Limited on 9 June 2023, gave to Menzies Aviation (Namibia) (Pty) Ltd to cease the rendering of the ground handling services and vacate the Hosea Kutako International Airport was not reasonable and is thus invalid.
- 2 The notice of 9 June 2023, referred to in paragraph 1 of this Order is set aside.
- 3 The prayer to stay the execution of this court's order issued under case HC-MD-CIV-MOT-GEN-2022/00233 pending the outcome of the review application under case HC-MD-CIV-MOT-REV-2022/00155 is dismissed.
- 4 The prayer to stay the execution of this court's order issued under case HC-MD-CIV-MOT-GEN-2022/00233 pending the determination of the Menzies appeal in the Supreme Court from case HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331 is dismissed.

- 5 The prayer to set aside the certifications by the fourteenth and/or fifteenth and/or sixteenth respondent, of Paragon's staff and equipment, as fit for purpose, to comply with the contract entered into between the Namibia Airports Company Limited and Paragon to provide ground handling services at Hosea Kutako International Airport, is dismissed.
- 6 Each party must pay its own costs.
- 7 The matter is regarded as finalised and removed from the roll.
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JUDGMENT

UEITELE J:

Introduction and background

[1] In this matter we have one applicant, Menzies Aviation (Namibia) (Pty) Ltd ('Menzies') and sixteen respondents, but the dispute is just between three parties, namely the applicant Menzies Aviation (Namibia) (Pty) Ltd (Menzies) on the one hand and the Namibia Airports Company Limited (the 'Airports Company') and Paragon Investment Holdings (Pty) Ltd JV Ethiopian Airlines ('Paragon') on the other hand. These parties have been engaged in multiple and protracted litigation for the past two years and the end to these disputes appears to be a distant reality.

[2] The background facts which gave rise to this application are chronicled in a number of judgments of this Court¹ and an appeal judgment of the Supreme Court². I

¹ See *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); *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-REV-2022/00155) [2023] NAHCMD 281 (23 May 2023); *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Limited* (HC-MD-CIV-MOT-GEN-2023/00256) [2023] NAHCMD 328 (16 June 2023); *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-REV-2022/00155) [2023] NAHCMD 378 (05 July 2023).

² *Menzies Aviation Namibia (Pty) Ltd and Another v Namibia Airports Company Limited* (SA 48-2022) 2023 NASC (9 June 2023).

will therefore not repeat the background facts as set out in those judgments here. But the long and short of the matter is that during 2014, the Airports Company entered into a written agreement with Menzies, for Menzies to perform 'ground handling services' at the Hosea Kutako International Airport ('HKIA').

[3] 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 (that is 31 December 2021), the Airports Company invited new bids in respect of the ground handling services at HKIA. Following the invitation of bids for the ground handling services Menzies and the Airports Company, in January 2022, agreed to further extend the ground handling services agreement between them for a further period of six months up to 30 June 2022, but subject to a month's written notice of termination should the procurement process pending at the time be finalised prior to the termination date.

[4] Both Menzies and Paragon participated 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 Airports Company. Menzies, aggrieved by its disqualification, took the matter to the Review Panel constituted in terms of s 58 of the Public Procurement Act 15 of 2015, but the review was dismissed by the Review Panel during February 2022.

[5] In the meantime, and on 11 April 2022, Menzies launched a review application against the Airports Company 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 Airports Company acted *ultra vires* the powers granted to it to conduct the procurement process itself when the procurement 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 its exclusion from the evaluation of the bids. That review application is still pending before this court.

[6] After Menzies launched its review application on 11 April 2022 the Airports Company in a letter dated 22 April 2022 sought an undertaking from Menzies that the latter would vacate HKIA when the agreement between them expires on 30 June 2022. When Menzies refused to give the requested undertaking, the Airports Company launched an urgent application on 27 May 2022 seeking a declarator that the agreement to provide ground handling services at HKIA concluded during January 2022 (between it and Menzies) would terminate on 30 June 2022 and that Menzies would be obliged to, on that day, cease to provide services to the Airports Company. Menzies opposed that application. On 29 June 2022, this court per Justice Sibeya, granted the orders sought by the Airports Company in its urgent application. A day after (that is, on 30 June 2022) this court granted its judgment and made its orders, the Airports Company issued a notice to all stakeholders in the following terms:

‘Kindly take notice that Menzies Aviation will continue to provide ground handling services at the HKIA until further notice.’

[7] Menzies was aggrieved by the judgment and orders of this court and as a result, lodged an appeal to the Supreme Court against the entire judgement and orders of Justice Sibeya. In the meantime and while the appeal in the Supreme Court was pending, Menzies, during October 2022, filed an application to file supplementary affidavits in its review application and for an interdict *pendente lite* against the Airports Company 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.

[8] Menzies’ application to stay the execution of this court’s judgment (Judge Sibeya’s) of 29 June 2022 was filed during October 2022, heard on 24 April 2023 and judgment was delivered on 23 May 2023 dismissing Menzies’ application³. Menzies was aggrieved by the dismissal of its application and filed an application for leave to appeal to the Supreme Court against the dismissal of its application for an interdict *pendente lite*. On 5 July 2023⁴, this court released its judgment granting Menzies leave to appeal to the Supreme Court against the dismissal of its application for stay of

³ *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-REV-2022/00155) [2023] NAHCMD 281 (23 May 2023).

⁴ *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-REV-2022/00155) [2023] NAHCMD 378 (05 July 2023).

execution of the orders and judgment of Justice Sibeya pending the Review application it instituted on 11 April 2022.

[9] The Supreme Court on 9 June 2023 delivered its judgment in the appeal against the orders and judgment of Justice Sibeya and dismissed Menzies appeal. On the same day, that is, on 9 June 2023, the Airports Company gave Menzies notice to cease the ground handling services and vacate the HKIA by Tuesday 13 June 2023. It is that notice that triggered this urgent application which was filed on Monday 12 June 2023 at 12h18 and set down for hearing on the same day at 17h30. In that application, Menzies sought the following relief:

'1 The applicant's non-compliance with the prescribed periods of time and forms of service, is hereby condoned, including its non-compliance with the Practice Directive that urgent application must be set down at 09h00, and the matter is enrolled as one of urgency in terms of Rule 73(3) of the rules of this court.

2 That a *rule nisi* be issued, calling upon the respondents to show cause on 3 July 2023 at 10h00, or on such other date and time as the respondents may anticipate, why the execution of the high court's order issued in case HC-MD-CIV-MOT-GEN-2022/00233 in terms of which it was ordered by Sibeya J that:

"3. 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;"

should not be suspended pending;

2.1. A Declarator order to be issued - on the return date - that the NAC is obliged to give Menzies reasonable notice to vacate the HKIA, and that the Notice given - or demand made - by NAC to Menzies on Friday 9 June 2022 (to vacate the Hosea Kutako International Airport on Tuesday 13 June 2023) was not reasonable, and in as far as required, setting aside;

2.1.1. such Notice or Demand; and/or

2.1.2. the certification(s) by the fourteenth and/or fifteenth and/or sixteenth respondent, of Paragon's staff and equipment, as fit for purpose, to comply with the contract entered into between the NAC and Paragon to provide ground handling services at Hosea Kutako International Airport, and/or

2.2. The determination of the applicant's application for leave to appeal against the judgement of Rakow J in case *HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331*, in terms of which she refused to grant an order suspending the implementation of the tender and contract; and if leave is granted by Rakow J; and/or

2.3. The determination of the applicant's appeal in the Supreme Court from case *HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331*;

3 The respondents are also called upon to show cause, on the return date, why those who oppose the relief sought herein should not pay the applicants costs of this application, including the costs of one instructing and two instructed counsel.

4 It is ordered that, pending the return date, the execution of the order made by Sibeya J referred to in paragraph 2 above, shall be suspended.'

[10] Both the Airports Company and Paragon gave notice to oppose Menzies' application. Mr Desmond Amunyela the Executive Director of Paragon deposed to the affidavit in support of the opposition of Menzies. Naturally Mr Amunyela lamented the short time that Paragon was given to file documents in opposition of the Menzies application. At the hearing on Monday 12 June 2023 I decided to first hear the points *in limine* raised by Paragon and on 15 June 2023 I dismissed the points *in limine* raised by Paragon. I furthermore condoned Menzies' non-compliance with the prescribed periods of time and forms of service and heard the matter as one of urgency as contemplated in rule 73 (3) of the Rules of this court.

[11] I furthermore granted a respondent who wished to oppose Menzies' application leave to file its answering affidavit by not later than 23 June 2023 and also granted

Menzies leave to, if so advised, file its replying affidavit by not later than 26 June 2023. I also suspended the orders issued by Justice Sibeya on 29 June 2022 under case number HC-MD-CIV-MOT-GEN-2022/00233, pending the determination of the dispute under this application. I then postponed the matter for hearing to 4 July 2023. This judgment now deals with the substantive relief (quoted above) sought by Menzies.

The remaining relief and the basis of the relief sought by Menzies

[12] I indicated that on 15 June 2023 I ruled that Menzies application was urgent and I thus heard Menzies application on that basis (i.e. that it was urgent). I furthermore stayed the execution of the orders of this court issued by Justice Sibeya on 29 June 2022 pending the determination of this application. The remaining relief that Menzies seeks in this application is therefore a stay of execution of the orders of this court issued by Justice Sibeya on 29 June 2022 pending:

(a) an order declaring the notice which the Airports Company gave to Menzies on Friday 9 June 2023 for it to cease rendering ground handling services at HKIA by 13 June 2023 and to vacate HKIA on 13 June 2023 (the 09 June 2023 notice) as unreasonable;

(b) an order setting aside the '*09 June 2023 notice*;

(c) an order setting aside Ms Calista Goabas' or Aaron Kauraisa or The Executive Director of the Namibia Civil Aviation's or all three of them's certification of Paragon's staff and equipment, as fit for purpose, to comply with the contract entered into between the Airport's Company and Paragon to provide ground handling services at HKIA;

(d) determination of Menzies' application for leave to appeal against the judgement of Rakow J in case HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331, in terms of which she refused to grant an order suspending the implementation of the tender and contract; and if leave is granted by Rakow J the determination of the

applicant's appeal in the Supreme Court from case HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331.

[13] The basis on which Menzies is seeking the relief that it is seeking is its contention that the notice that it was given by the Airports Company to cease the ground handling activities and vacate HKIA is unreasonable. It furthermore seeks the relief on the basis that the eviction orders granted by Justice Sibeya on 29 June 2022 are no longer in existence and to prevent the Airports Company and Paragon from implementing an allegedly patently unlawful award until such time as its main review is heard.

Interim interdict and stay of execution *pendente lite*

[14] I have indicated that Menzies is seeking the stay of execution of the orders granted by Justice Sibeya (pending a declaration that the notice given to it by the Namibia Airports Company is unreasonable and also pending the hearing of the appeal to the Supreme Court against Justice Rakow's refusal to stay the execution of Justice Sibeya's orders pending the determination of Menzies' application to review and set aside the decision of the Airports Company to award the tender to render ground handling services to Paragon) on the basis that; one, it has made out a strong case (by meeting the requirements of an interim interdict) that the award of the tender to provide ground handling services to Paragon by the Airports Company was patently unlawful; and, two, the judgment or orders to evict Menzies from the HKIA were made redundant by the agreement of 30 June 2022 between the Airports Company and Menzies.

[15] In light of the contentions and bases on which Menzies rely for the relief it is seeking I have come to the conclusion that Menzies' application is not, about interdicts as counsel for Menzies attempted to make it. An interdict, according to Jones & Buckle⁵ is an extraordinary remedy and summary remedy issued where someone needs protection of his or her rights against unlawful interference or the threat of unlawful interference. It is true that in a broad sense, to grant or refuse a stay of

⁵ Erasmus and Van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates Court in South Africa* 6th Ed at 71.

execution is to grant or refuse an interdict, but there are nonetheless differences between interdicts and stay of execution.

[16] As I said an interdict is an injunction. It is a remedy by a court, either prohibiting somebody from doing something (prohibitory interdict), or ordering him to do or carry out a certain act (mandatory interdict)⁶. Stay of execution on the other hand (which stems from the Latin term “*cesset execution*” which means let execution cease) is a court order to temporarily suspend the execution of a court judgment or other court order.

[17] Counsel for the applicant appears to disregard the difference between the two. The distinction between ordinary interdicts and stays of execution in particular is more apparent when one considers the separate requirements for each remedy. With an interdict and specifically an interim interdict⁷, the applicant must:

(a) show a *prima facie* right arising from a contract, statute or the common law⁸. It must be noted that an interest is not enough to seek the relief of an interdict;

(b) that there is a reasonable probability of irreparable harm may be caused to the applicant if the interdict is not granted⁹;

(c) that there is no alternative remedy available to the applicant¹⁰. In order to grant the interim interdict; and

(d) the balance of convenience must lean in favour of the applicant if the interdict is to be granted alternatively in the favour of the respondent if the interdict is to be refused, it can be said that the balance of convenience is the measuring factor the court uses¹¹. The simplest way to describe the balance of convenience is that it weighs who would suffer the lesser damage. All these factors must be present.

⁶ See *Oxford Quick Reference Dictionary of Law* 8th Ed. And also see Herbstein and Van Winsen *The Civil Practice in the Superior Courts of South Africa*.

⁷ An Interim interdict is a restoration or preservation of the specific scenario until a final decision relating to the rights of the parties can be made by the Court, it must be noted that the granting of an interim interdict does not and should not affect the court's decision when making its final decision.

⁸ *Setlogelo v Setlogelo* 1914 AD 221.

⁹ *Ibid.*

¹⁰ *Hix Networking Technologies v System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A)

¹¹ *Locke v Van Der Merwe* 2016 (1) NR 1.

[18] On the other hand, in an application for a stay of execution the requirements are *real and substantial justice*: In *Graham v Graham*¹² Clayden, J after surveying the authorities on the power of a court to stay execution came to the conclusion that the Court has power to see that injustice must not be done pending the decision of the question of review.

[19] In *Cohen v Cohen*¹³ Goldin J explains that the premise on which a court may grant execution pending litigation is the inherent power reposed in it to control its own process. He said:

'Execution is a process of the Court and the Court has inherent power to control its own process subject to the Rules of Court. Circumstances can arise where a stay of execution as sought here should be granted on the basis of real and substantial justice. Thus, where injustice would otherwise be caused, the Court has the power and would, generally speaking, grant relief'.

[20] The principles generally applied by a court in exercising its discretion to stay an execution, was neatly summarised by Waglay J, in *Gois t/a Shakespeare's Pub v Van Zyl and Others*¹⁴ as follows:

'The general principles for the granting of a stay in execution may therefore be summarised as follows:

- (a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
- (b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.
- (c) The court must be satisfied that:
 - (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and

¹² *Graham v Graham* 1950 (1) SA 655 (T) at 657 - 9).

¹³ *Cohen v Cohen* 1979 (3) SA 420 (R).

¹⁴ *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (LC).

(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed, i.e. where the underlying *causa* is the subject-matter of an ongoing dispute between the parties.

(e) The court is not concerned with the merits of the underlying dispute - the sole enquiry is simply whether the *causa* is in dispute.'

[21] The courts power to regulate its process being a common law discretionary power, must be exercised judicially. Its exercise of the power will therefore be fact specific and the guiding principle will be that execution will be suspended where *real and substantial justice requires that*.

[22] 'Real and substantial justice' is a concept that defies precise definition, rather like 'good cause' or 'substantial reason'¹⁵. It is for the court to decide on the facts of each given case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment, if they are, on what terms any suspension it might be persuaded to allow should be granted.

[23] In *Janse van Rensburg v Obiang and Another*¹⁶ the court reasoned (and I agree with that reasoning) that a court will grant a stay of execution where the underlying *causa* of the judgment in question is being disputed or no longer exists, or when an attempt is made to use the machinery of execution for ulterior or improper purposes. A litigant with an enforceable judgment is entitled to payment, and only in rare cases would be delayed in that process. It thus follows that even where the *causa* of a claim is undisputed, a court may still grant a stay where otherwise an injustice will be done. This will be the case, where the possibility exist that the order on which the execution is predicated, may be expunged.

[24] It is against the background of what I have stated in the preceding paragraphs that I, on 15 June 2023, stayed the execution of the orders granted by Justice Sibeya on 29 June 2022. It is also in accordance with the principles governing applications for

¹⁵ *Stoffberg NO v Capital Harvest (Pty) Ltd* (2130/2021) [2021] ZAWCHC 37 (2 March 2021) para [26].

¹⁶ *Janse van Rensburg v Obiang and Another* 2023 (3) SA 591.

stay of execution pending litigation between parties that I will consider and determine Menzies' current application. For the reasons that I have set out so far, I do not intend to engage and discuss all the authorities that I was referred to during the hearing of this matter notably the cases of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁷ and *Auas Diamond Company (Pty) Ltd v Minister of Mines and Energy*¹⁸ and will simply consider first, whether Menzies is entitled to a reasonable notice to cease rendering the service at the HKIA and to vacate the Airport and secondly whether the order of Justice Sibeya of 29 June 2022 is extant.

Is the notice of 9 June 2023 reasonable?

[25] As I have indicated in the introductory part of this judgment, on 9 June 2023 the Supreme Court handed down its judgment in the matter in which Menzies appealed against the orders and judgment of Justice Sibeya of 29 June 2022 and the reasons that were released on 11 August 2022. On the same day that the Supreme Court handed down its judgment the Airports Company gave Menzies notice to cease rendering ground handling services and vacate HKIA by 13 June 2023, which is to be precise 3 days and ten hours' notice, approximately a '4 days' notice. Menzies states that the 4 days' notice is irrational, unreasonable and must be set aside.

[26] The Airports Company does not accept nor dispute that the 4 days' notice it gave Menzies is unreasonable. The Airports Company argues that Menzies cry that the notice is unreasonable is a ruse to enable it to remain at the HKIA. The Airports Company further argues that Menzies' intention is to frustrate any transition of ground handling services to the new service provider Paragon. It argued that 'Menzies' strategy must be called out for what it is: 'it was and remains an untenable, misconceived and legally impermissible attempt to protect and perpetuate the *status quo* for Menzies' own financial gain.'

[27] Whatever the Airports Company's contentions are or may be, the factual scenario before me is that on 30 June 2022 the Airports Company notified all stakeholders that '*Menzies Aviation will continue to provide ground handling services at the HKIA until further notice.*' It can also not be disputed that on 9 June 2023 the

¹⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

¹⁸ *Auas Diamond Company (Pty) Ltd v Minister of Mines and Energy* 2017 (2) NR 418 (SC).

Airports Company gave Menzies 4 days' notice to cease the rendering of the ground handling service and vacate HKIA.

[28] What thus must be considered is whether the 4 days' notice that the Airports Company gave Menzies is a reasonable period of notice. 'Reasonable' is a relative term and what is reasonable depends upon the circumstances of each case. In *Tiopaizi v Bulawayo Municipality*¹⁹ the Court held that:

'... where the parties have not agreed upon a definite time, the law requires reasonable notice to be given by the one to the other, to expire in the case of all but domestic servants at the end of a term (Grotius, Roman-Dutch Law, III. 19.8 Voet, 19.2.10; D. 13.6., lex 17, par. 3). What constitutes such reasonable time is nowhere laid down, and was left either to local custom or to the discretion of the judge, who had to decide upon all the circumstances of the case. Grotius, e.g., states that in the case of a house the notice should be at a convenient time "so that the lessor may have an opportunity of letting his house, and the lessee of providing himself with another house." Voet (idem 18) points out that even the person who has no right to be there, having hired the property from another who had no right to let it to him, even such person is entitled to reasonable notice to expire at the end of the term so that he would be able to procure another place.'

[29] It follows that in order to determine what is reasonable within a given factual context one must have regard to the full spectrum of the relevant facts and circumstances that bear on the matter in issue. In the *Tiopaizi v Bulawayo Municipality* matter the Court quoting Corbin held that:

'There is a large element of uncertainty in the determination of the length of a 'reasonable time' in any particular case... Furthermore, there is a difference between what may be reasonable in the light of the circumstances existing at the time the contract is made and what is reasonable in the light of the circumstances as they occur during the course of performance.'

[30] I do not find it necessary for the purposes of the present enquiry to decide whether, in determining what a reasonable period of notice is, regard must be had to the actual circumstances existing at the time of notice or those existing at the time the contract is made. Whichever position applies, a reasonable notice must allow the

¹⁹ *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 326.

person to whom such notice is given, in this case Menzies, sufficient time in which reasonably to regulate its own affairs.

[31] In the present matter, as the Airports Company itself recognises that ground handling services refer to a wide range of operational and safety services provided at an airport to facilitate aircraft arrivals and departures. Menzies of necessity has employed people to carry out the required functions in this regard and those peoples' contracts must now be terminated, heavy duty safety and security equipment have to be moved and removed from the Airport. I, therefore, have no doubt that a substantial undertaking was not only contemplated, but in fact eventuated. The termination of the agreement would have brought to an end Menzies' ground handling services at HKIA and Menzies must take stock of its situation. It would either have to find new avenues in which to employ those persons whose duties would be affected by the termination of the agreement, or dispense with their services.

[32] The people concerned (that is, those people employed by Menzies), or at least some of them, would have been employed either on fixed term contracts or for an indefinite period but subject to statutory or contractual notices, and the period (4 days) of notice given is definitely inadequate to enable Menzies to dispense with their services (if it was necessary to do so) before or at the same time that the agreement would have terminated. Having regard to those circumstances alone, which were present or must have been contemplated both at the time of the contract and at the time of notice, it seems to me that 4 days is not a sufficient period of notice.

[33] I accordingly find that the notice of 9 June 2023, is not reasonable and is therefore invalid. I accordingly set aside that notice. Taking into account the notice periods contained in the contracts between the parties which contracts have now terminated by effluxion of time, I further find that a reasonable period of notice is 30 days.

Has Menzies made out a case for stay of execution pending the hearing of the appeal under case HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331?

[34] Another basis on which Menzies seeks the stay of the execution of the orders granted by Justice Sibeya on 29 June 2022 is its contention that those eviction orders are no longer operational and extant. Counsel for Menzies argued that the orders are no longer extant, because the contract which was held by Justice Sibeya, to have come to an end at 30 June 2022, was extended or novated by the Airports Company.

[35] The core question that must thus be determined in this matter is whether the notice by the Airports Company on 30 June 2022 to all stakeholders that 'Menzies Aviation will continue to provide ground handling services at the HKIA until further notice' amounts to an agreement which extended or replaced the agreement which Justice Sibeya found to have come to an end on 30 June 2022.

[36] A contract is often defined merely as an agreement made between two or more persons with the intention of creating an obligation or obligations²⁰. Gerhardt and Murray argue that: 'A contract is a type of agreement. For a contract to be valid, therefore, the parties should intend to establish a mutual obligation and express this occurrence of intention in an outwardly perceptible form by means of declaration of will²¹'. Van der Merwe *et al*²², argue that 'one must then assume that an agreement will be a contract if the parties intend to create an obligation or obligations and if in addition, the agreement complies with all other requirements which the law sets for the creation of obligations by agreement (such as contractual capacity of the parties, possibility of performance, legality of the agreement and prescribed formalities)'.²³

[37] In view of the definition of a contract professor Kerr AJ²³ has argued that the obligation to do what one has promised to do is sufficient justification for enforcing an actual agreement. It follows that once parties have agreed to create legally binding obligations they will be bound by the agreement until when they have performed in terms of the agreement. In contract there is a time when, or a period within which performance is due. It thus follows that failure to perform at the time when or during the period within which performance is due, without lawful excuse, is a breach of contract because it is failure to do what one has contracted or promised to do.

²⁰ See LAWSA Vol 5 at paragraph 124.

²¹ Lubbe Gerhardt and Christina Murray: *Contract Cases and Material Commentary*, 3rd Edition.

²² Van der Merwe, van Huyssteen, Reinecke; and Lubbe; *Contract: General Principles* 2nd Edition

²³ Kerr A J: *The Principles of the Law of Contract*, 2002, 6th Ed at 19.

[38] In the present matter, both Justice Sibeya and the Supreme Court found that the agreement between Menzies and the Airports Company for the former to render ground handling service at HKIA terminated on 30 June 2022. Despite that finding the Airports Company on 30 June 2022 announced that Menzies will continue to render ground handling service at HKIA until further notice. Although the announcement or notice of 30 June 2022 by the Airports Company was a unilateral act, by that unilateral act the Airports Company intended to create legally binding obligations between it and Menzies. It thus follow that the Airports Company having intended to create legally binding obligations, is bound by its undertaking or agreement (that Menzies will continue to render ground handling services until further notice) until when it has performed in terms of that undertaking or agreement.

[39] I pause here to digress and comment that both counsels for Paragon and the Airports Company emphasized and relied heavily on the Supreme Court's statement that:

'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 ... 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.'

[40] It is true that the Supreme Court described Menzies as an invader and had no right to render ground handling service at HKIA after 30 June 2022. But we must not forget that counsel for Menzies points out (correctly in my view) that, at the time when the Supreme Court made the pronouncements that I have quoted in the preceding paragraph, the Supreme Court was not aware of the fact that the Airports Company granted Menzies the right to render ground handling services until further notice.

[41] I return to the argument that Menzies had to continue to render ground handling services until it was given notice by the Airports Company. It furthermore follows that

the Airports Company cannot rely on the Judgment and orders of Justice Sibeya as confirmed by the Supreme Court on 13 June 2023 to terminate and evict Menzies from HKIA, because Menzies is not rendering the ground handling services in terms of the agreement that Justice Sibeya found terminated on 30 June 2022, but is rendering ground handling services in terms of the notice of 30 June 2022 by the Airports Company to all stakeholders. It follows that, if the Airports Company cannot evict Menzies on the basis of the contract that terminated on 30 June 2022, I cannot order a stay of the order of 29 June 2022.

[42] What the Airports Company undertook, on 30 June 2022, was to engage Menzies for the latter to render ground handling services at HKIA until when it terminates that engagement by giving Menzies reasonable notice, this undertaking superseded the agreement which Justice Sibeya (confirmed by the Supreme Court) found to have terminated on 30 June 2022.

[43] Having found that the 9 June 2023 notice by the Airports Company to Menzies is invalid, the Airports Company is obliged to give Menzies a reasonable notice for the latter to cease rendering the ground handling services and vacate the HKIA. Once the Airports Company has given Menzies reasonable notice that the agreement for it to render ground handling services at HKIA is terminated, Menzies will have no right to remain at HKIA and render the ground handling services.

[44] In the application before me, Menzies is in effect saying I must interdict the Airports Company from doing what it, on 30 June 2022, undertook to do namely to give Menzies reasonable notice of when it must cease to render the ground handling services and vacate HKIA. The basis for that request is the alleged unlawful awarding of the tender to Paragon. Apart from the fact that the lawfulness or unlawfulness of the award of the tender to render ground handling service at HKIA to Paragon is irrelevant to the consideration of what the Airports Company's obligations in terms of its undertaking on 30 June 2022 are, it is so that, if I were to interdict the Airports Company from performing in terms of the undertaking it made to Menzies, I will be intruding in to the parties' freedom to contract.

[45] The doctrine of privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract²⁴. Taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract. The South African Supreme Court of Appeal in *Wells v South African Alumenite Company*²⁵ held that:

‘If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.’

[46] Parties enter into contractual agreements in order for a certain result to materialise. The fact that parties enter into an agreement gives effect to their constitutional right of freedom to contract, however, the carrying out of the obligations in terms of that contractual agreement relates to the principle of *pacta sunt servanda*.

[47] In *Barkhuizen v Napier*²⁶ the South African Constitutional Court Ngcobo J who authored the Court’s judgment opined that:

‘... public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. ... These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.’

²⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (SCA) at para [12].

²⁵ *Wells v South African Alumenite Company* 1927 AD 69 at 73.

²⁶ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para [57].

[48] In view of what I have stated in the preceding paragraphs I will heed the advise given by Cameron JA²⁷ that judges must exercise 'perceptive restraint' when called upon to interfere with contracts freely concluded between parties, lest contract law becomes unacceptably uncertain. The learned judge also argued that the judicial enforcement of terms, as agreed to, is underpinned by 'weighty considerations of commercial reliance and social certainty'. For these reasons I find that justice would turn on its head if I were to interdict the Airports Company from giving Menzies reasonable notice of the termination of the agreement for it to render ground handling services and vacate HKIA. *Real and substantial justice* would not be achieved by granting a stay of execution.

[49] There is another basis why I cannot grant Menzies its prayer as prayed for in paragraphs 2.2 and 2.3 (namely to stay the execution of Justice Sibeya's orders of 29 June 2022 pending the determination of the applicant's application for leave to appeal against the judgement of Rakow J in case *HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331*, in terms of which she refused to grant an order suspending the implementation of the tender and contract; and if leave is granted by Rakow J; and/or the determination of the applicant's appeal in the Supreme Court from case *HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331*) of its notice of motion.

[50] The reason or basis why I cannot grant those two prayers are these. On 24 April 2023 Justice Rakow heard an application by Menzies for the following relief:

'Interdicting the first respondent [Airports Company] from

1.1 implementing the purported award, or any contract entered into between the first [Airports Company] and second respondent [Paragon] as a result of the purported award, in respect of tender/procurement reference number NCS/ONB/NAC-054/2021; pending final determination of applicant's pending review in case number HC-MD-CIV-MOT-REV-2022/00155 and Applicant's pending appeal in the Supreme Court of Namibia in case number SA 48/2022 and /or;

1.2. terminating the agreement entered into between the applicant [Menzies] and the first respondent [Airports Company] – which came about as a result of the applicant's appointment by the first respondent [Airports Company] in its "Notice to Stakeholders" dated 30 June 2022

²⁷ In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at para [94].

(attached hereto as NOM1) in terms of which first respondent [Airports Company] stated that "Kindly take notice that Menzies Aviation will continue to provide ground handling services at HKIA until further notice." - Unless the applicant [Menzies] has given first respondent [Airports Company] twelve months' notice. Alternatively, as from the moment, the first respondent [Airports Company] has (if so advised) successfully applied to a court of law to set aside its decision to appoint the applicant [Menzies] in its letter dated 30 June 2022 where to set aside its decision to appoint applicant [Menzies] in its letter dated 30 June 2022 where applicant (*sic*) gave notice to the world at large that: "Kindly take notice that Menzies Aviation will continue to provide ground handling services at HKIA until further notice."

2. Costs of the application in respect of those respondents opposing this relief, such costs to include the costs of one instructing and two instructed counsel and to be taxed and not to be limited to the provisions of rule 32(11).'

[51] Simply put the purpose of the application heard on 24 April 2023 by Justice Rakow is that Menzies sought to interdict the Airports Company pending the outcome of the main application, being the review application in case number HC-MD-CIV-MOT-REV-2022/00155 from ejecting it from HKIA. This is the exact same relief that Menzies is seeking in paragraphs 2.1 and 2.2 of the present application.

[52] It is well established in our law that once a court has duly pronounced a final judgment, it becomes *functus officio*; its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases²⁸. Justice Rakow refused Menzies' application, this court is thus *functus*.

The certification of Paragon's Staff and Equipment

[53] Another relief sought by Menzies is an order setting aside the certification by the fourteenth or fifteenth or sixteenth respondents, or by the fourteenth and fifteenth and sixteenth respondents of Paragon's staff and equipment, as fit for purpose, to comply with the contract entered into between the NAC and Paragon to provide ground handling services at Hosea Kutako International Airport. The basis on which this relief is sought has not been established and I therefore decline to entertain that request.

²⁸ Baxter L: *Administrative Law*. 1984; *Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 at 306F; *Chirambasukwa v Minister of Justice, Legal and Parliamentary Affairs* 1998 (2) ZLR 567 (SC).

Costs

[54] The law as to costs is relatively settled. Costs should generally follow the event. In this matter Menzies was successful in having the notice given to it by the Airports Company on 9 June 2023 declared invalid and set aside, but failed in its quest to interdict the Airports Company from terminating the ground handling service agreement. In my view Menzies achieved a 50 per cent success and a 50 per cent failure. It is thus just fair and reasonable that each party pays its own costs.

[55] In light of the reasons that I have set out, the findings that I have made and conclusions that I have reached in this judgment make the following order:

1. It is declared that the notice which the Namibia Airports Company Limited on 9 June 2023, gave to Menzies Aviation (Namibia) (Pty) Ltd to cease the rendering of the ground handling services and vacate the Hosea Kutako International Airport was not reasonable and is thus invalid.
2. The notice of 9 June 2023, referred to in paragraph 1 of this Order is set aside.
3. The prayer to stay the execution of this court's order issued under case HC-MD-CIV-MOT-GEN-2022/00233 pending the outcome of the review application under case HC-MD-CIV-MOT-REV-2022/00155 is dismissed.
4. The prayer to stay the execution of this court's order issued under case HC-MD-CIV-MOT-GEN-2022/00233 pending the determination of the Menzies appeal in the Supreme Court from case HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331 is dismissed.
5. The prayer to set aside the certifications by the fourteenth and/or fifteenth and/or sixteenth respondent, of Paragon's staff and equipment, as fit for

purpose, to comply with the contract entered into between the Namibia Airports Company Limited and Paragon to provide ground handling services at Hosea Kutako International Airport, is dismissed.

6. Each party must pay its own costs.
7. The matter is regarded as finalised and removed from the roll.

S F I UEITELE
JUDGE

APPEARANCES:

APPLICANT: R Heathcote SC, with him JP Jones
Instructed by Viljoen & Associates, Windhoek

FIRST RESPONDENT: V Maleka with him U Hengari
Instructed by Shikongo Law Chambers, Windhoek

SECOND RESPONDENT: S Namandje, with him Taimi Ileka -Amupanda
Of Sisa Namandje & Co Inc, Windhoek