

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-MOT-REV-2022/00155

INT-HC-OTH-2022/00331

INT-HC-OTH-2022/00335

In the matter between:

MENZIES AVIATION (NAMIBIA) (PTY) LTD

APPLICANT

and

NAMIBIA AIRPORTS COMPANY LTD

1ST RESPONDENT

PARAGON INVESTMENT HOLDINGS (PTY) LTD

2ND RESPONDENT

JV ETHIOPIAN AIRLINES

SKYE AVIATION SERVICES (PTY) LTD

3RD RESPONDENT

NAMIBIA FLIGHT SUPPORT CC JV EQUITY AVIATION

4TH RESPONDENT

KINGS GROUND AIRPORT SERVICES (PTY) LTD

5TH RESPONDENT

MENELL INVESTMENT CC JV NAS

6TH RESPONDENT

CENTRAL PROCUREMENT BOARD OF NAMIBIA

7TH RESPONDENT

CHAIRPERSON OF THE REVIEW PANEL

8TH RESPONDENT

GOVERNMENT ATTORNEY

9TH RESPONDENT

GOVERNMENT ATTORNEYS

10TH RESPONDENT

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

Coram: RAKOW J

Heard: 24 April 2023

Delivered: 23 May 2023

Flynote: Interlocutory – Application to supplement founding papers – Application for a *pendent lite* interdict – The application to supplement founding papers amounts to special circumstances as it relates to the record before – Applicant further advanced a reasonable explanation as to why the information was not placed before court at an earlier stage – No new agreement came into place regarding the *pendente lite* interdict – No explanation put before the court explaining the delay in bringing the *pendente lite* interdict application.

Summary: Two applications came before the court at the same time in this matter. The first was an application to present new evidence in a pending review matter, in that they wish to supplement their founding papers, and the second was an application for a *pendente lite* interdict. Two separate applications were filed in this case by the applicant but the arguments were heard on the same day.

Both these applications are opposed by the first and second respondents only. The eighth respondent chose not to oppose these applications. The other respondents are not currently before the court. The second respondent further filed a condonation application for the late filing of its opposing affidavit. The applicant also filed a condonation application seeking an order that the applicant's non-compliance with the court order dated 8 November 2022 and the late filing of the applicant's interlocutory application to provide leave to supplement its founding papers be condoned.

Held that: regarding the question of whether the applicants made out a case for special circumstances allowing for the granting of the order, the court must find in the affirmative. The issue raised by the applicant in this application indeed amounts to

special circumstances as it relates to the record before the court, which in turn forms the basis of the review application as the allegation is made that the bid of the second respondent was not properly completed and the allegation made was that it was completed after the initial records were filed. This indeed requires an answer from the first and second respondents and the allegation is of such a nature that it indeed impacted the crux of the matter.

Held that: The applicant further advanced a reasonable explanation as to why the information was not placed before the court at an earlier stage when it explained that it had no reason to believe that the hard copy of the record they received and the records uploaded on e-justice would differ from one another, only to realize the same at a later stage when they perused the records and noted such discrepancies. It is also true that the applicant had complained numerous times about the record not being uploaded fully and missing some parts.

Held that: the court finds that the interpretation by the first respondent is the most probable interpretation and that no new agreement came into place.

Held further that: a year later is simply too long a period from bringing the review application to instituting the *pendente lite* application. There was further no explanation put before the court explaining the delay in bringing the said application and the court must conclude that as such, the application lacks bona fides. To add to this, the court also took into account that the applicant knew since at least November 2021 that they were not successful but chose to only institute review proceedings in June 2022.

ORDER

1. The application to supplement is hereby granted with each party to carry its own costs.
2. The *pendente lite* application is dismissed with costs, which costs shall include the costs of one instructed and two instructing counsel and the costs of two legal practitioners in the case of the second respondent.

3. The review matter is postponed to 6 June 2023 at 15:30 to allocate new dates for the filing of the supplementary affidavit as well as further papers. Parties are to file a joint status report on or before 1 June 2023 setting out possible further filing dates.

JUDGMENT

RAKOW J:

Introduction

[1] Two applications came before me at the same time in this matter. The first was an application to present new evidence in a pending review matter, in that the applicant wish to supplement their founding papers, and the second was an application for a *pendente lite* interdict. Two separate applications were filed in this case by the applicant but the arguments were heard on the same day.

[2] Both these applications are opposed by the first and second respondents only. The eighth respondent chose not to oppose these applications. The other respondents are not currently before the court. The second respondent further filed a condonation application for the late filing of its opposing affidavit. The applicant also filed a condonation application seeking an order that the applicant's non-compliance with the court order dated 8 November 2022 and the late filing of the applicant's interlocutory application to provide leave to supplement its founding papers be condoned.

Background

[3] On 1 January 2014, the first respondent and the applicant concluded a ground-handling services agreement ("the Agreement") for five years, in other words, the agreement had to endure from 1 January 2014 to 31 December 2018. The agreement was extended on 1 January 2019 to 31 December 2021. On 1 January 2022, the parties agreed to an extension by means of an addendum for a period of

six months, with an end date of 30 June 2022. In addition, the addendum provided by way of clause 3.2 for a one-month cancellation notice.

[4] As the first respondent is a public enterprise, it needs to follow the public procurement process as prescribed in the Public Procurement Act 15 of 2015. It accordingly issued an invitation for bids for providing ground-handling services in August 2021. The tender for the provision of ground-handling services at Hosea Kutako International Airport was awarded to the second respondent on 13 December 2021. The first respondent entered into a contract for the purposes of providing ground-handling services at Hosea Kutako International Airport with the second respondent on 9 February 2022. The applicant informed the first respondent on 7 April 2022 of its intention that the second respondent will not be permitted to take over any ground-handling operations and that the applicant will continue to render these services until further notice.

[5] On 13 April 2022, the applicant launched the current review application still pending before this court. The first respondent requested undertakings from the applicant that it would vacate on 1 May 2022 on 30 June 2022. The first respondent did not receive any satisfactory reply from the applicant and filed its urgent application on 27 May 2022 to compel the applicant to vacate the premises and hand over the ground-handling services at Hosea Kutako International Airport, which application was opposed by the applicant and they also instituted a counter-application.

[6] This application came before my brother, Sibeya J, on 21 June 2021. The applicant's counter-application was first dismissed on 29 June 2022, with the first applicant obtaining the relief it sought. Sibeya J ordered that:

‘2. It is declared that the agreement entered into between the applicant and the first respondent for the first respondent to provide ground handling services at Hosea Kutako International Airport ("HKIA") shall terminate on 30 June 2022 ("the termination date").

3. It is declared that the first respondent shall at the end of the day on the termination date:

3.1 cease to provide ground-handling services at HKIA;

3.2 hand over all security access cards or other equipment entitling it to access HKIA or any premises which it occupies at HKIA by virtue of the ground-handling services agreement with the applicant; and

3.3 vacate occupation of any premises at HKIA occupied by virtue of the ground handling services agreement.'

[7] Pursuant to the orders being granted, the applicant noted an appeal to the Supreme Court on 30 June 2022, which was the last day on which they had to vacate and cease providing ground-handling services at Hosea Kutaku International Airport. The applicant further indicated that whilst the appeal is pending that they will continue to render the ground-handling services as before.

Point in limine

[8] The first and second respondents raised the issue that the applicant failed to comply with rules 32(9) and 32(10) when they brought this application. From the documents filed on the e-justice system, it is clear that this application was brought without engaging the respondents in terms of rule 32(9), subsequently filing a rule 32(10) report pertaining to the engagement. Although this is true, the supplementation application is an application that only the court can decide upon. Parties cannot agree between themselves regarding the relief that is being sought and for that reason, the court is inclined to proceed with the hearing of the application although there was no compliance with rules 32(9) and (10). The non-compliance will however be taken into account when deciding on an appropriate cost order as the rule 32 process had the potential to allow for the shortening of proceedings.

Purpose of the application seeking leave to supplement the founding papers in the main application

[9] The applicant placed the following before court, in its founding affidavit. The review proceedings in this matter was launched in April 2022. The first respondent was responsible for the uploading of the review record and started uploading the said record on 10 May 2022, 11 May 2022 ,and again on 27 May 2022. These documents were not paginated and the financial proposal which formed part of the second respondent's bid was not initialed on the uploaded documents. The second

respondent's original bid was initiated by Mr Amunyela (for the second respondent) and Mr /Uirab who is the Chief Executive Officer for the first respondent.

[10] The record was scrutinized and several defects and anomalies were identified. These were set out in a status report and subsequently ,the first respondent uploaded a second review record on 13 June 2022. There were differences between this record and the first, for example, the arrangement of the pages and sections differed. The financial proposal that appeared in the second record remained unsigned. The applicant used this record to prepare its supplementary founding affidavit and brought these shortcomings to the attention of the first respondent's legal practitioners.

[11] The first respondent's legal practitioners then uploaded a third record, on 1 August 2022, 3 August 2022 and 16 August 2022. On 4 August 2022, the applicant's legal representatives received a hard copy of what purports to be the second respondent's original bid. This copy of the record included the second respondent's financial documents as well as the company documents which now appeared to be signed. It however only contained Mr Amunyela's signature and not the signature of the representative of Ethiopian Airlines and although Mr /Uirab's signature appeared on the bid documents of the first and second record, the financial documents did not have the said signature but the hard copy set's financial documents, now had his signature displayed on it. These documents did not form part of the third record uploaded on the electronic file. The actual bid documents were also not uploaded together with the third record.

[12] The applicant instructed a handwriting expert to inspect these documents and to prepare a report on her findings. The expert is a certain Ms Yvette Palm who is based in Cape Town, South Africa. She travelled to Namibia and inspected the original bid documents of the second respondent, the hard copy of the record, and the documents uploaded on the e-justice system.

[13] The current application before the court therefore is limited to dealing with an expert report compiled by Ms Palm whose report deals with specific investigations, analysis, and opinions in respect of the handwriting appearing on the original bid of the second respondent as compared to several other documents in the first two records.

The arguments on the supplementation application

[14] For the applicant, it was argued that they needed to follow this process as it would not be fair just to deal with the findings of Ms Palm in a replying affidavit as the respondents would then have no opportunity to deal with these allegations. It would be proper to amplify the founding affidavit and then proceed and allow the respondents to deal with the said findings in answering affidavits, should they wish to do so.

[15] It was further argued that courts will only grant leave to supplement founding papers in exceptional and special circumstances. The facts which the applicant wishes to introduce in the supplementary founding papers are indeed new and were indeed unexpected since the applicant could not have reasonably expected that the second respondent's bid documents contained in the first and second review records would have differed materially from those documents contained in the third review record. They could also not have expected the presence of what seems to be forged initials appearing in the second respondent's bid as observed by Ms Palm.

[16] On behalf of the first respondent, it was argued that the applicant in truth does not want 'to deal with' the 'expert report of Ms Yvette Palm'. What the applicant wants to do is to file a fourth set of papers to put up an affidavit about what it says will be in a report yet to be produced. It has failed to explain when it will come to hand. The applicant inexplicably awaited the filing of the NAC and Paragon's answering affidavits before seeking to supplement its founding affidavit.

[17] It was further argued that the following is clear and cannot be disputed: First, the applicant had the full review record (ie the third record) by August 2022; Secondly, the applicant, as a consequence, had the opportunity to address issues pertaining to any alleged defects and inconsistencies in the record, by the time when the supplementary founding affidavit was filed by 21 September 2022; Thirdly, the applicant's explanation why it did not bother with the third record was as explained entails two wholly inconsistent and internally inadequate propositions. The first is that the applicant was entitled to assume, without even scrutinizing, that the third record was identical to what it had received. The second is that 'Menzies' counsel had already completed the bulk of the supplementary founding affidavit with regard to the

Paragon Bid as contained in the first and second record.’ Fourthly, when a party is provided with what it terms ‘a third record’, it is indeed incumbent upon it and its legal practitioners to scrutinize that record for any material differences from a prior record. They have no entitlement, as is asserted, to ‘expect’ (i.e assume) that what has been separately provided is the same as not one, but two, prior iterations. Nor are they entitled to call in aid, as bizarrely here is done, that because a draft of the supplementary affidavit was prepared before the third record was received, the latter could be ignored. Neither misconception entitles the plaintiff to do what it now attempts.

[18] The first respondent will further be suffering prejudice in that finality in a review challenge instituted over two years ago will inevitably be yet further delayed by the introduction of new evidence and that the evidence, if admitted, would naturally have been addressed by both respondents. Had that evidence been proffered in the founding affidavit, or the supplementary founding affidavit, it could have been addressed in the answering affidavits. But these have already been filed. It also entails that the late expert evidence almost inevitably must be met by each of the respondents in fairness being allowed to file what would be a fifth and sixth set of papers filed by the parties. With, no doubt, a seventh set in reply by the plaintiff.

[19] On behalf of the second respondent, it was submitted that there would be massive prejudice to the respondents who have since filed their answering affidavits. Further, they submit that acceptance of a further affidavit will be against public policy and interest in particular that finality will not be reached in the near future in a context of a procurement award of a tender for a fixed time period of five years.

Legal Considerations in the supplementation application

[20] An applicant must establish a prima facie case in its founding papers¹ and as such it is crucial that an applicant’s founding affidavit must contain all evidence necessary to support its case.² In *Kapia v Minister of Urban and Rural Development*³ Prinsloo, J analyzed the requirements for the granting of such relief. She said:

¹ Damaseb, P Court Managed Civil Procedure of the High Court of Namibia Law, Procedure and Practice 1 st Ed at 153; See also *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at 600.

² *Erastus Tjiundikua Kahuure and Another v Minister of Regional and Local Government and Housing and Rural Development* 2012 (28) (SC) para 25; Damaseb supra.

³ *Kapia and Another v Minister of Urban and Rural Development and Others* (HC-MD-CIV-MOT-REV 395 of 2019) [2023] NAHCMD 47 (13 February 2023).

'It is trite that in motion proceedings, the evidence must be led before the court by way of affidavit. The affidavits are limited to three sets. These affidavits are supporting affidavits, answering affidavits, and replying affidavits. If a party requires the filing of further affidavits, leave must be sought from the court to do so.

13. The practice in respect of filing affidavits in application or motion proceedings has been developed by various decisions over time and was previously not formulated by the rules of court or statutes. That position was, however, remedied by rule 66(2) of the Rules of Court, which reads as follows:

'(2) The applicant may, within 14 days of the service on him or her of the affidavit and documents referred to in subrule (1)(b), deliver a replying affidavit and the court may in its discretion permit the filing of further affidavits.' (my emphasis)

14. In *Fisher v Seelenbinder*⁴, Ueitele J discussed the filing of further affidavits as follows⁵:

'[17] It is trite that in motion proceedings the ordinary rule is that three sets of affidavits are allowed, i.e. the supporting affidavits, the answering affidavits, and the replying affidavit. In the matter of *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd*⁶, this Court stated that it may in its discretion permit the filing of further affidavit. Quoting from the South African case of *Juntgen T/A Paul Juntgen Real Estate v Nottbusch*⁷, it said:

'Generally, a Court has a discretion, which is inherent to the just performance of its decision reaching process, to grant that relief which is necessary to enable a party to make a full representation of his true case.'

[18] In the matter of *Maritima Consulting Services CC v Northgate Distribution Services Ltd*⁸, the Court held that leave to file further affidavits by a party will be granted only in special circumstances or if the court considers such a course advisable. Thus, the filing of further answering affidavits will be permitted where, for instance, 'there is a possibility of prejudice to the respondent if further information is not allowed'.' (my underlining)

⁴ *Fischer v Seelenbinder* (A 217/2015) [2017] NAHCMD 323 (10 November 2017).

⁵ Also, see *Serve Investments Eight Four Pty Ltd v Agricultural Professional Services Pty Ltd & 6 Others* (HC-MD-CIV-MOT-GEN-2021/00096) [2021] NAHCMD 470 (08 October 2021).

⁶ *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd* 2007 (1) NR 222 (HC), Also see the matter of *Gabrielsen v Coertzen* Case No: (P) I 3062/2009 an unreported judgment of this Court delivered on 29 June 2011.

⁷ *Juntgen T/A Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W).

⁸ *Maritima Consulting Services CC v Northgate Distribution Services Ltd* (A 282-2014) [2015] NAHCMD 121 (29 May 2015).

15. In *The Namibian Competition Commission v Puma Energy (Pty) Ltd*⁹, Ueitele J expanded on the issue of 'special circumstances' and prejudice but, more importantly, the discretion of the court and discussed it as follows:

'[11] In the South African case of *James Brown & Hamer (Pty) Ltd v Simmons N.O*¹⁰ the Court said:

'It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable.'

[12] The above principle was endorsed by this Court when it held that leave to file further affidavits by a party will be granted only in special circumstances or if the court considers such a course advisable. Thus, the filing of further answering affidavits will be permitted where, for instance, 'there is a possibility of prejudice to the respondent if further information is not allowed.'¹¹ The court will allow the filing of further affidavits only in exceptional circumstances and will expect an explanation as to why the filing of further affidavits is necessary.¹²

[13] The court exercises judicial discretion when it considers whether or not to allow the filing of a further affidavit. In the exercising of discretion, the Court essentially asks the question 'Do the circumstances of the case demand the filling of an additional affidavit?' The authorities that I have perused indicate that special circumstances have been held to exist and a departure from the general rule has been allowed where there was something unexpected in the applicant's replying affidavits¹³ or where a new matter was raised therein and also where the Court desired to have fuller information on record.

⁹ *The Namibian Competition Commission v Puma Energy (Pty) Ltd* (HC-MD-CIV-MOT-EXP-2016/00275) [2018] NAHCMD 36 (16 February 2018).

¹⁰ *James Brown & Hamer (Pty) Ltd v Simmons N.O* 1963 (4) SA 656 (AD) at 660.

¹¹ See the unreported judgment in the matter of *Maritima Consulting Services CC v Northgate Distribution Services Ltd* A 282-2014) [2015] NAHCMD 121 (delivered on 29 May 2015).

¹² *James Brown & Hamer (Pty) Ltd v Simmons N.O* 1963 (4) SA 656 (AD).

¹³ *Rens v Gutman N.O* 2002 4 All SA 30 (C).

[14] Where, however, there is a possibility of prejudice to the respondent if further information is not allowed the Court will, so the learned authors *Herbstein and van Winsen*¹⁴ say, admit the further affidavits. There must, however, be a proper and satisfactory explanation which negatives *mala fides* or culpable remissness as to the cause of the facts or information not being put before the Court at an earlier stage and what is more important is that the Court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs.' (my underlining)

16. A party seeking to introduce further affidavits in proceedings is seeking the court's indulgence. In the matter of *Bangtoo Bros and Others v National Transport Commission and Others*¹⁵, the court held that where supplementary affidavits do not deal with new matters arising from the reply by an applicant or evidence which came to the attention of the parties subsequent to the filing of their affidavits, the party seeking the indulgence must provide an explanation which is sufficient to assuage any concern that the application is mala fide or that the failure to have introduced the evidence in question is not due to a culpable remissness of such party.

17. ...

18. I am of the view that the findings that this court needs to make in the current instance are three-fold, namely: a) whether the applicants made out a case for special circumstances that would allow the granting of the order sought by the applicants, b) whether a reasonable explanation was advanced as to why the facts or information not being put before the Court at an earlier stage, and lastly if the respondents would suffer prejudice if the court grants the application.'

[21] Regarding prejudice, the court in *Transvaal Racing Club v Jockey Club of South Africa*¹⁶ said the following:

' I think that if there is an explanation which negatives mala fides or culpable remissness as the cause of the facts or information not being put before the Court at an earlier stage, the Court should incline towards allowing the affidavits to be filed. As in the analogous cases of the late amendment of pleadings or the leading of further evidence in a trial, the Court tends to that course which will allow a party to put his full case before the Court. But there must be a proper and satisfactory explanation as to why it was not done earlier, and, what is also important, the Court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs.'

¹⁴ In their book *The Civil Practice of the Supreme Court of South Africa*, 5 ed, p 433.

¹⁵ *Bangtoo Bros and Others v National Transport Commission and Others* [1973 \(4\) SA 667](#) (N) at 680B.

¹⁶ *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604 A-E.

The *pendente lite* interdict

Background

[22] 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 first respondent - in its 'Notice to Stakeholders' dated 30 June 2022 - stated that 'Kindly take notice that Menzies Aviation will continue to provide ground handling services at HKIA until further notice.' The applicant contends that in so doing, an agreement was reached and remains in place. The applicant therefore continues to occupy and provide ground-handling services in terms of a new agreement concluded after the Sibeya J judgment, in the urgent application.

[23] The applicant currently enjoys undisturbed possession of the rental premises at the Hosea Kutako International Airport and also continues to provide ground handling at the airport in terms of a new agreement reached on 30 June 2022. With the appeal pending, the first respondent expressly elected not to act in terms of rule 121(2) and despite the tender being awarded to Paragon, it was never implemented.

The *pendente lite* interdict application

[24] The application filed by the applicants seeks the following orders:

'Interdicting the first respondent from

1.1 implementing the purported award, or any contract entered into between the first and second respondent 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 and the first respondent – which came about as a result of the applicant's appointment by the first respondent in its "Notice to Stakeholders" dated 30 June 2022 (attached hereto as NOM1) in terms of which first respondent stated that "Kindly take notice that Menzies Aviation will continue to provide ground handling services at HKIA until further notice." - Unless the applicant has given first respondent twelve months' notice. Alternatively, as from the moment, the first respondent has (if so advised) successfully applied to a court of law to set aside its decision to appoint the applicant in its letter dated 30 June 2022 where to set aside its decision to appoint applicant in its letter dated 30 June 2022 where applicant 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).'

[25] Simply put the purpose of this application is to seek interdictory *pendente lite* relief pending the outcome of the main application, being the review application in case number HC-MD-CIV-MOT-REV-2022/00155.

Arguments raised by the parties

The applicant

[26] On behalf of the applicant, it was argued that the interdict should be approached from the premise that:

1. The applicant has a clear right, or at the very least a prima facie right to remain in possession of the rental premises and to provide the ground handling services in terms of the 30 June 2022 agreement, until it is lawfully terminated or set aside;
2. The first and second respondent's contractual relationship and ultimately their rights stem from a nullity and as such they have none;
3. The first respondent has obligations towards the applicant in terms of the 30 June 2022 agreement;

[27] It was submitted that the second respondent's rights to the actual implementation of "the contract" awarded pursuant to "the bid process" are squarely attacked together with the validity of the entire tender process and award of the contract. What then ultimately remains is a consideration of the balance of convenience and the balance of convenience unquestionably favours the applicant, as the applicant contended that the tender is a nullity, the second respondent is unable to provide the services, and that the applicant entered into a new contract with the first respondent. The plaintiff further remains in possession of the leased premises and continues to provide services to the first respondent's customers. It is more convenient to leave the applicant in occupation of the premises, providing safe and regulation-compliant services to the first respondent, than to dispossess the applicant and allow the second respondent to take possession and then only for it to be confirmed later that the tender and contract pursuant thereto was indeed a nullity which would then leave the first respondent with no ground handler.

[28] Regarding the other requirements for interim relief, the applicant argues that they did establish a prima facie right. The first respondent had no exemption from the Ministry of Finance to run the procurement process themselves as the procurement amount is N\$25 000 000. In addition, it also became clear that the applicant is the only bidder who qualified for the tender, and in actual fact the applicant should have been granted the tender. Thus, but for the fact that the first respondent should have, but did not, obtain an exemption from the Minister of Finance to go out on tender, the tender would and should have been awarded to the applicant. The fact that the bid amount exceeds the threshold is denied by the first respondent but the applicant argues that it is a bare denial without any substance to it.

[29] It is further argued by the applicant that the first respondent was provided with, and accepted an advance 'draft copy' of the second respondents bidding documents. It was also submitted that the second respondent's bid was corrected after the fact and both these scenarios point to a gross irregularity. The first respondent further entered into a new agreement with the applicant after the Sibeya J judgement on the urgent application, which agreement is still in place.

[30] It is further submitted that there is a well-grounded apprehension of irreparable harm if the relief is not granted. The applicant alleges that the second respondent will not be able to render ground-handling services at the airport. It further seems that this contention is not denied by the first respondent in its answer to this allegation. It is also clear from the first respondent's answering affidavit that the first respondent does not recognize the fact that the applicant is providing services in terms of a new agreement but that is an arrangement pending the outcome of the appeal matter.

[31] The applicant further contends that the harm will be irreparable in circumstances where it would need to de-establish the site; retrench workers and move equipment into storage. It will further also have financial implications for the applicant should they have to vacate the site. The applicant also argues that it has no other remedy other than to approach this court seeking the relief that it does as it has elected to enforce its rights in terms of the 30 June 2022 contract and as such to seek specific performance.

The first respondent

[32] For the first respondent, it was argued that the judgment of Sibeya J, which is appealed against, found that:

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

[33] The effect of what Sibeya J held was that the first respondent had a responsibility to ensure that the second respondent commences with ground-handling services. The applicant, however, never sought to timeously interdict the first respondent from entering into the ground-handling services agreement with the second respondent or the implementation of the award. The applicant knew already

by 9 February 2022 or latest March 2022 that the first respondent entered into an agreement with the second respondent for the provision of ground-handling services at Hosea Kutako International Airport.

[34] On behalf of the first respondent, it was pointed out that the applicant failed to seek interdictory relief against the first respondent when it launched its review application in April 2022. The applicant claimed a full six months later that they seek interdictory *pendente lite* relief pending the outcome of the main application. It is not explained by the applicant why it waited this long to bring its interdict before this court.

The interdictory relief flows directly from the review application launched in April 2022 and must have been sought together with the main review relief, in order to avoid a multiplicity of applications.

[35] The most important consideration which arise in this application is that the applicant failed to explain why it could not in April 2022 apply to interdict the implementation of the award as its review application before a review panel was already dismissed in early January 2022. The applicant should have interdicted the first respondent in early February 2022 from concluding the contract with the second respondent, yet it failed to do so. It was further argued that the relief sought by the applicant in its notice of motion in the current application is almost identical to the relief sought in its urgent counter-application which was struck from the roll, and is now awaiting appeal determination. The founding affidavit indeed contains portions directly lifted from the founding and founding supplementary affidavits filed by the applicant in the pending review.

[36] The applicant, in correspondence dated 30 June 2022, indicated to the first respondent's legal advisors to advise their client of the effect of rule 121(2) regarding the suspension of the operation of and execution of the order of 29 July 2022. It indicated that evicting the applicant in the face of an appeal will be mala fide and illegal and will also constitute spoliation. More importantly, the letter further recorded that while the appeal is pending the applicant will continue to render the services. So there was no new agreement that came into force. The first respondent can in any event not enter into a new agreement with the applicant without complying with the terms of the Public Procurement Act.

[37] It was submitted that the applicant has not met the requisites for the grant of interim interdicts. The first respondent has an extant agreement with the second respondent. In the year 2020, the applicant's annual financial statements recorded accumulated losses of N\$13 106 720 and the applicant's total liabilities exceeded its assets by N\$13 106 620. As it is, the applicant has provided no evidentiary response quite apart from the bare claim that 'Menzies is not under any financial strain'. In summary, it was argued that the applicant has not shown that it has a prima facie right, in the sense that even if the award was to be set aside.

The second respondent

[38] On behalf of the second respondent it was argued that the application should be dismissed by the court using its wide discretion on the basis that by the date of hearing of this application, the Supreme Court would have heard the applicant's appeal on 19 April 2023. The parties would therefore be waiting for the Supreme Court's decision. If that appeal is dismissed, then it would have been inappropriate for this court to, in the meantime, make an order when the same issues may be disposed of by the Supreme Court, altogether. Because of the real possibility of the Supreme Court not setting aside Sibeya J's order it would be inappropriate for this court to, at this stage, make an order that may be incompatible with the possible outcome of the Supreme Court which can be any time as that appeal had since been heard.

[39] The applicant further asks the court to amend an agreement between parties. This is because the applicant itself alleges an agreement between it and the first respondent that it would continue rendering services 'until further notice.' That notwithstanding, it now seeks that this court amends the agreement, through an order sought under paragraph 1.2 of the notice of motion, to introduce a term that the ground handling services must be provided and the contract must not be terminated 'unless the applicant has given the first respondent twelve months' notice.' It was submitted that once the applicant alleges that it has accepted the first respondent's interim agreement, it must follow that the court would not have the competence to amend terms agreed upon by the parties so as to introduce a term that the agreement cannot be terminated unless the first respondent has given the applicant 12 months' notice.

[40] The applicant further attempted to obtain the same results through its purported collateral challenge in the first respondent's application before Sibeya J. Having failed after its application was struck from the roll, it proceeded without seeking leave from this court as required under s 18(3) of the High Court Act 16 of 1990, to file an appeal to the Supreme Court. They submit that the Supreme Court is more than likely (than not) to strike the applicant's appeal against the striking of its purported collateral challenge from this court's roll on the basis that it required leave.

Legal considerations

[41] In *Namibia Airports Company Ltd v Fire Tech Systems CC*¹⁷, the Supreme Court said:

' [42] Mr Töttemeyer emphasised that the sought in the augmented notice of motion was and remains pre-eminently in the public interest – national security and public safety issues are at play, and that no factual basis was set out by the appellant for the conclusion that it would be C severely inequitable or disastrous if the requested relief would be granted.

[43] It is common cause, firstly, that the first respondent had not as soon as it became aware of the facts through the newspaper article in September 2014, or immediately thereafter, instituted urgent proceedings – its notice of motion sought relief in the ordinary course. Secondly, the first respondent had not sought to interdict performance under the contract. In these circumstances the appellant was not only entitled, but indeed obliged to give effect to an extant administrative act.

[44] I agree with the submission by Mr Gauntlett, that because E respondent elected to lodge its application only in November/December 2014, despite reasonably being in a position to do so already in September 2014, but importantly, in my view, because the first respondent elected not to seek urgent interim relief, the equipment was shipped in January 2015, and that is why the time of the hearing of the application in the court a quo the contract had already been fully performed.

[45] In *Chico/Octagon Joint Venture v Roads Authority and Others*,¹⁸ the appellant in an attempt to persuade the Roads Authority to award the tender to it, launched an application to review and set aside the decision of the Roads Authority. This application was coupled with

¹⁷ *Namibia Airports Company Ltd v Fire Tech Systems CC* 2019 (2) NR 541.

¹⁸ *Chico/Octagon Joint Venture v Roads Authority and Others* (81 of 2016) [2017] NASC 34 (21 August 2017).

an application for an urgent interdict preventing the implementation pending the review application. The parties in that matter not only agreed to expedite the proceedings in the review application, but after the application was dismissed agreed to expedite the appeal hearing. The first respondent in this appeal elected not to follow this route and cannot now complain that H the appellant ignored its request not to implement any decisions relating to the said tender, since the appellant never sought interim relief.

[46] My understanding of Mr Töttemeyer's submission in [39] supra is that the appellant and second respondent should immediately (and prudently) have desisted from giving effect to the terms of the concluded contract. In this regard it is in my view instructive to refer to the judgment of Mogoeng CJ, in the matter of *Tshwane City v Afriforum and Another*,¹⁹ where it was stated that it 'is a restraining order itself, as opposed to the sheer hope or fear of one being granted, that can in law restrain'. And he continued in para 75 –
 'there was no obligation on Council to desist from removing old street names upon becoming aware of an urgent application for a restraining order had been filed. Only sheer choice or discretion, but certainly not any legal obligation or barrier, would lead to action being desisted from in anticipation of a successful challenge or application for an interdict.'

[47] C This court in *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another*,²⁰ referred with approval to Kirland Investments, 20 which in turn referred to *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others*,²¹ where the position was explained as follows:

'Until the administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[48] The court in Anhui supra at 351A-B, quoting Baxter where the learned author stated in this regard that, 'we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment.'

¹⁹ *City of Tshwane Metropolitan Municipality v Afriforum and Another* (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016).

²⁰ *President of Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* (SA 59 of 2016) [2017] NASC 7 (28 March 2017).

²¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004).

[42] In *New Era Investments (Pty) Ltd v Roads Authority*²², Damaseb DCJ remarked in para 45 that:

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

[43] Sibeya J in *Namibia Airports Company Limited v Menzies Aviation Namibia (Pty) Ltd and Another*²³ already said that:

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

And further that:

‘[80] Menzies chose to review the award of the bid, but did not seek an interim interdict, those not taking heed of the above warning by Damaseb DCJ in the *New Era*²⁴ Investment matter. Menzies made the said decision out of choice and which decision it must live with. In the absence of the interim interdict, nothing prevented NAC from effecting the award of the bid.’

[44] In *Jantjies v Jantjies and Others*²⁵ where Levy AJ said that:

‘Inherent in an order granted *pendente lite* is that an applicant shows its *bona fides* by instituting the action as soon as possible. The applicant advances no reason for the delay. Ms Van Niekerk argues that the matter can be decided on motion. This cannot be done as the dispute is material and oral evidence and cross-examination is necessary. In *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd 1969 (4) SA 443 (C)* where an interdict was granted *pendente lite* but despite the lapse of some five months the applicant had not issued summons to institute the action, the Court discharged the rule nisi. In that case Van Wyk J (as he then was) said at 445E-F:

²² *New Era Investment (PTY) LTD v Roads Authority and Others* (8 of 2014) [2017] NASC 36 (8 September 2017).

²³ *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).

²⁴ *Supra*.

²⁵ *Jantjies v Jantjies and Others* 2001 NR 26 (HC) at p30 E-H.

“There is such a thing as tyranny of litigation and a Court of law should not allow a party to drag out proceedings unduly. In this case, we are considering an application for an interdict *pendente lite* which from its very nature, requires the maximum expedition on the part of an applicant.”

See *BP Namibia (Pty) Ltd v Southline Retail Centre CC 2009 (1) NR (HC) 268 at p 272 para 14*:

“The applicant on the other hand has approached the court for an order evicting the respondent from the premises on the ground that the lease has expired by effluxion of time. The issue is one of contract between the parties *inter se*. It is an established principle of the law that the public interest requires that the parties should comply with their contractual obligations and this is the principle to which the applicant holds the respondent. The authority for this proposition is *Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA SCA at para 15*.”

[45] *Mushwena v Government of the Republic of Namibia* ²⁶stated at paragraph 23:

‘ [23] It is no small matter that there is now pending before the highest Court in the land a live appeal on the ruling of Hoff J that the Courts of Namibia have no jurisdiction to try the applicants. If I understand Mr Frank’s argument properly, this Court has to shut its eyes to that. With the greatest respect, that would be artificial. If that argument is to hold sway, it would mean that there is no productive purpose to be served by the appeal now before the Supreme Court. The workings of the judiciary would then become a great mystery to the public whose interest it is meant to serve.’

Conclusions

Supplementation application

[46] Prinsloo J in *Kapia v Minister of Urban and Rural Development*²⁷ identified three questions that need to be answered when considering whether to allow supplementary affidavits to be filed or not. These are:

a) whether the applicants made out a case for special circumstances that would allow the granting of the order sought by the applicants,

²⁶*Mushwena v Government of the Republic of Namibia* 2004 NR 94.

²⁷ *Kapia v Minister of Urban and Rural Development* (HC-MD-CIV-MOT- REV- 2019/00395) [2022] NAHCMD 47 (13 February 2023).

b) whether a reasonable explanation was advanced as to why the facts or information were not being put before the Court at an earlier stage, and

c) if the respondents would suffer prejudice if the court grants the application

[47] Regarding the question of whether the applicants made out a case for special circumstances allowing for the granting of the order, the court must find in the affirmative. The issue raised by the applicant in this application indeed amounts to special circumstances as it relates to the record before the court, which in turn forms the basis of the review application as the allegation is made that the bid of the second respondent was not properly completed and the allegation made was that it was completed after the initial records were filed. This indeed requires an answer from the first and second respondents and the allegation is of such a nature that it indeed impacted the crux of the matter.

[48] The applicant further advanced a reasonable explanation as to why the information was not placed before the court at an earlier stage when it explained that it had no reason to believe that the hard copy of the record they received and the records uploaded on e-justice would differ from one another, only to realize the same at a later stage when they perused the records and noted such discrepancies. It is also true that the applicant had complained numerous times about the record not being uploaded fully and missing some parts.

[49] Regarding the question of whether the respondents stand to be prejudiced by allowing another set of affidavits to be filed, the court finds that the applicant is indeed correct in not raising this issue in its reply to the answering affidavits of the respondents but to afford them the opportunity to ventilate the issue properly in further answering affidavits, which they will be entitled to file should the court allow for the filing of a further supplementary founding affidavit.

[50] Taking these arguments into account as well as the reasoning followed by the court, the court will indeed permit the filing of further supplementary affidavits by the applicant. Earlier in this judgement, I pointed out that I intend to take into account the non-compliance with rules 32(9) and (10) when deciding on the allocation of costs in

this application. For that reason, I find that regarding the costs of this application, I am not going to let it follow the event but make an order that each party will carry its costs.

The pendente lite interdict application

[51] This application specifically seeks to allow the applicant to continue the ground-handling services until the review process is complete, which can include a possible appeal as well. The nature of the current arrangement plays a huge role in the decision the court is eventually going to take.

[52] The applicant maintains that a new agreement was concluded between itself and the first respondent, which will continue until further notice. The first respondent argued that this was not the case, the old agreement continued after the applicant filed an appeal at the Supreme Court against the judgment of Sibeya J and after its legal practitioners were informed by the legal practitioners of the applicant that the status quo is to remain pending the outcome of the Supreme Court matter. The court finds that the interpretation by the first respondent is the most probable interpretation and that no new agreement came into place.

[53] The applicant further took longer than a year since instituting the review proceedings to bring the *pendente lite* application. Looking at the authorities which were cited, this application must be brought as soon as possible. A year later is simply too long a period from bringing the review application to instituting the *pendente lite* application. There was further no explanation put before the court explaining the delay in bringing the said application and the court must conclude that as such, the application lacks bona fides. To add to this, the court also took into account that the applicant knew since at least November 2021 that they were not successful but chose to only institute review proceedings in June 2022.

[54] The most important consideration, however, is that the Sibeya J judgment dealt with an almost similar application and the applicant appealed that outcome to the Supreme Court. The matter is therefore currently under consideration at the Supreme Court as the arguments were already heard. For this court to grant the

Pendente Lite application would result in the Supreme Court matter becoming an academic exercise and this court cannot simply shut its eyes to that.

[55] As a result of the above reasons, the court dismiss the *Pendente lite* application with costs, such costs to include the costs of one instructing and two instructed counsel in the case of the first respondent and the costs of two legal practitioners in the case of the second respondent.

[56] I, therefore, make the following orders:

1. The application to supplement is hereby granted with each party to carry its own costs.
2. The *pendente lite* application is dismissed with costs, which costs shall include the costs of one instructed and two instructing counsel and the costs of two legal practitioners in the case of the second respondent.
3. The review matter is postponed to 6 June 2023 at 15:30 to allocate new dates for the filing of the supplementary affidavit as well as further papers. Parties to file a joint status report on or before 1 June 2023 setting out possible further filing dates.

E RAKOW
Judge

APPEARANCES

Applicant:	R Heathcote SC with JP Jones, Instructed by Viljoen & Associates, Windhoek
First respondent:	J Gauntlett SC with AT Hengari Instructed by Shikongo Law Chambers, Windhoek
Second respondent:	S Namandje with J Arnols Of Sisa Namandje & Co. Inc., Windhoek

