REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

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 KAURAISA	**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 328 (16 June 2023)

Coram: UEITELE J
Heard: **12 June 2023**
Order: **16 June 2023**

Flynote: Civil Procedure - Rules of the High Court – Rule 73(1) and (4) read with Practice Direction 27(1) – urgent application

Civil Procedure — Execution — Warrant of execution — Suspension — Court's inherent jurisdiction to order — Exceptional circumstances and interests of justice.

Civil Procedure — Abuse of Court process - when therefore the Court finds an attempt made to use for ulterior purposes the machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.

Summary: The applicant and the first and second respondents have been engaged in multiple and protracted litigation for the past two years. In the proceedings to which the present application relate, the Namibia Airports Company Limited (the Airports Company) on 29 June 2022 obtained a judgment in its favour from Justice Sibeya in this Court against Menzies Aviation Namibia (Pty) Ltd (Menzies) declaring that the agreement in terms of which Menzies was rendering ground handling services at the Hosea Kutako International Airport (HKIA) on behalf of the Airports Company, terminated on 30 June 2022. In addition to that declaration, the court further declared that Menzies had to seize rendering ground handling services on behalf of the Airports Company and vacate the HKIA by the end of 30 June 2022.

On 30 June 2022, despite Justice Sibeya's judgment, the Airports Company issued a notice to all stakeholders that Menzies Aviation will continue to provide ground handling services at HKIA until further notice.

Menzies was, however, still aggrieved by the judgment of Justice Sibeya and lodged an appeal to the Supreme Court against the entire judgement and orders,

The Supreme Court on 9 June 2023, delivered its judgment in the matter and dismissed Menzies appeal. On the same day, that is, on 9 June 2023, the Airports Company gave Menzies notice to seize rendering the ground handling services and vacate the HKIA by 13 June 2023. It is that notice that triggered the present urgent application.

The urgent application was filed on Monday, 12 June 2023 at 12h18 and was set down for hearing at 17h30.

The relief sought by Menzies was in essence an order staying or put otherwise delaying the execution of Justice Sibeya's order of 29 June 2022, pending the determination of Menzies complaint that the Airports Company acted unreasonably and irrationally when it gave it three days' and 10 hours' notice to vacate the HKIA.

Paragon Investment Holdings (Pty) Ltd JV Ethiopian Airlines (Paragon) did not have an opportunity to file answering papers. Therefore, in terms of Rule 66(1)(c), Paragon raised the following legal issues:

Firstly, that this court has no jurisdiction to make an order which has the effect to trim it down or review another Judge's order. Secondly, Menzies' application was a complete abuse of the court's process. Thirdly**,** the Supreme Court order considered together with the order of Justice Sibeya is binding and final in terms of section 17 of the Supreme Court Act. Fourthly, the application can simply not be heard as it will result in a violation of the Second Respondent's rights to a fair trial under Article 12 of the Namibian Constitution. Fifthly, there was no public law decision made by the Airports Company after the Supreme Court order which could be open for a review as the order of Justice Sibeya was operative and of immediate effect. Hence, the issue of

more time before eviction is *res judicata* between the parties. Lastly, the matter is not urgent given the background.

At the hearing, the points *in limine* raised by Paragon where first decided.

Held that, the matter is urgent and can be heard on an urgent basis as envisaged in Rule 73 of the Rules of Court.

Held further that, this court has jurisdiction to hear Menzies' application because Menzies is not seeking an order from this court which will have the effect to trim down or review Justice Sibeya's order.

Held further that, Menzies' application does not amount to an abuse of the processes because in the present matter Menzies contends that the three days' notice that it was given by the Airports Company is irrational and unreasonable. Menzies has thus come to court for a declaration to that effect.

Held further that, the issue of *res judicata* does, not arise because the question of whether the three days' notice that the Airport's Company gave Menzies to vacate the HKIA is reasonable or not was never determined by either Justice Sibeya or the Supreme Court.

Held further that, on the authority of *Standard Bank v Atlantic Meat Market,* if this court hears the matter and issues a *rule nisi*, the Airports Company and Paragon's right to a fair trial as guaranteed under Article 12 of the Constitution will not be violated.

According, the second respondents' *points in limine* are dismissed.

ORDER

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1. The second respondents' points *in limine* are dismissed.

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

3. Any respondent who intends to oppose this application must file it answering affidavit by not later than 23 June 2023.

4. The applicant must, if so advised, file its replying affidavit by not later than 26 June 2023.

5. The applicant must file its heads of arguments by not later than 28 June 2023.

6. The respondents who oppose this matter must file their heads of arguments by not later than 1 July 2023.

7. The matter is postponed for hearing on 4 July 2023 at 11h00.

8. The orders issued by Justice Sibeya on 29 June 2022 under case number HC-MD-CIV-MOT-GEN-2022/00233, are suspended pending the determination of the dispute under this application.

JUDGMENT

UEITELE J:

Introduction and background

[1] The parties (in particular the applicant on the one side and the first and second respondents on the other side) before me have been engaged in multiple and protracted litigation for the past two years. In the proceedings to which the present application relate, the Namibia Airports Company Limited (the Airports Company) on 29 June 2022 obtained a judgment in its favour from my brother Justice Sibeya in this court against Menzies Aviation Namibia (Pty) Ltd (Menzies) declaring that the agreement in terms of which Menzies was rendering ground handling services at the

Hosea Kutako International Airport (HKIA) on behalf of the Airports Company, terminates on 30 June 2022. In addition to that declaration, the court further declared that Menzies had to seize rendering ground handling services on behalf of the Airports Company and vacate HKIA by 30 June 2022.

[2] The background facts of this matter are chronicled in both the High Court judgment[1] and the Supreme Court judgment[2] and I repeat the background facts as set out in the Supreme Court judgment here for the purpose of shedding light to the relief sought by Menzies in these proceedings and that background is this.

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

[4] This procurement process was for ground handling services at the HKIA upon termination of the agreement between the Airports Company and Menzies and involved a public bidding process as required by the Public Procurement Act which also prescribed certain requirements relating to this process.

[5] Both Menzies and the second respondent, Paragon Investment Holdings (Pty) Ltd JV Ethiopian Airlines (Paragon) partook in the procurement process as bidders. The bid of Menzies was disqualified on the basis of non-compliance with certain tender conditions and the bid of Paragon was accepted by the 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, but the review was dismissed by the Review Panel during February 2022.

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1 *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).

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

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

[7] 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 it had to be dealt with by the Central Procurement Board of Namibia. In addition, it sought a review of the procurement process based, essentially on its disqualification as a bidder, and hence its exclusion from the evaluation of the bids.

[8] The Airports Company in a letter dated 22 April 2022 sought an undertaking from Menzies that the latter would vacate the premises of the Airports Company at HKIA when the agreement between them expires through the effluxion of time. 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 would terminate on 30 June 2022 and that Menzies would be obliged to, on that day, cease to provide services to the Airports Company and give vacant occupation to it of the premises used by Menzies, which they occupied to render the services pursuant to the agreement with the Airports Company.

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

outside the statutory mandate of the Airports Company and that the Central Procurement Board was the entity which had to conduct the whole bid process.

[10] On 29 June 2022, this court per Justice Sibeya, granted the orders sought by the Airports Company in its urgent application and struck Menzies counter application from the roll. On 29 June 2022, this Court simply made orders and did not give reasons for its orders. The court on 11 August 2022 released its reasons for the orders that it made on 29 June 2022. 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.'

[11] 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 which is still pending before this court. Menzies application filed during October 2022 was heard in this court on 24 April 2023 and judgment was delivered on 23 May 2023 dismissing Menzies' application. 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.*

[12] The Supreme Court on 9 June 2023 delivered its judgment in the matter and dismissed Menzies appeal. On the same day, that is, on 9 June 2023, the Airports Company gave Menzies notice to seize rendering the ground handling services and vacate HKIA by 13 June 2023. It is that notice that triggered the present urgent application. The present application was filed on Monday 12 June 2023 at 12h18 and was set down for hearing at 17h30. In this application, Menzies seeks 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.'

[13] 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 has been given to file documents in opposition of the Menzies application, he said:

'….I was surprised that, it appears, the Applicant during the weekend [that is, 10 & 11 June 2023] prepared a massive application. According to the notice of motion the Respondents must file their notices to oppose at or before 17h00 today. Disconcertingly they are then given 30 minutes to file answering affidavits.

The Second Respondent did not have an opportunity at all to put up papers. Of course, the Applicant did not except that the Respondents will be able to file papers on a huge affidavit in a matter of minutes. So, the Applicant does not mean it when it requires the Respondents to file answering affidavits in those circumstances. The Second Respondent was only able to instruct its legal practitioner to raise preliminary objections and in the event of the objections not upheld to ask for more time for a period of 2 weeks. Accordingly, the Second Respondent does not waiver its right to file a comprehensive affidavit, dealing with the Applicant's allegations. It requires time. Therefore, the legal points stated herein are without prejudice to the Second Respondent's rights to answer.

7 Therefore, in terms of Rule 66(1)(c) the Second Respondent's counsel shall at the outset raise the following legal issues:

6.1 **Firstly,** in view of the declarator and eviction order in Sibeya, J's order referred to above (Annexure B) which order was of immediate effect and the Supreme Court

order (Annexure C) confirming that order without qualification the orders sought are incompetent. Furthermore, this court has no jurisdiction to make an order which has effect to trim it down or review another Judge's order. Accordingly, the court has no jurisdiction.

6.2 **Secondly,** I point out that the application is a complete abuse of the court's process.

6.3 **Thirdly,** the Supreme Court order considered together with the order of Justice Sibeya is binding and final in terms of section 17 of the Supreme Court Act.

6.4 **Fourthly,** the application can simply not be heard as it will result in a violation of the Second Respondent's rights to a fair trial under Article 12 of the Namibian Constitution.

6.5 **Fifthly,** there was no public law decision made by the First Respondent after the Supreme Court order which could be open for a review as the court order of Sibeya was operative and of immediate effect. Its implementation is with immediate effect. The Applicant asked for more time before Justice Sibeya and further relied on the rent ordinance but the Applicant's pleas in this respect were finally and conclusively rejected. Hence, the issue of more time before eviction is *res judicata* between the parties.

6.6 **Lastly,** the matter is not urgent given the background.

8. In view of the aforesaid and the time given, the Second Respondent's counsel with whom I only had a few minutes to consult will raise all those legal points *in limine* and in the event of those points *in limine* being not *(sic)* upheld the Second Respondent shall seek under Article 25(2) and (3) an order in protection of its right to a fair trial, that the matter be postponed for a period of 2 weeks to enable the Second Respondent to file answering affidavits.'

[14] As I indicated, Menzies set the application down for hearing at 17:30 on Monday 12 June 2023. At the hearing I decided to first hear the points *in limine* raised by Paragon and it is to those points *in limine* that I now turn.

Discussion

[15] I start the consideration of the points raised by Mr Namandje who appeared on behalf of Paragon with the following preliminary remarks. It is now a well-established principle of our law, which principle is necessary to emphasise that constitutional rights and court orders must be respected. In a constitutional democracy like ours no one must be left with the impression that court orders (even if they are flawed) are not binding, or that they can be flouted with impunity. I therefore associate myself with the remarks by the Constitutional Court of South Africa when it said:

'If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak.'[3]

[16] It thus follows that a court's decision whether it be a court order or a judgment is operational and executable once it is granted or handed down by the court. Although this holds true, there are instances where a party may approach a court for the court to suspend or stay the execution of its order or judgment. I will shortly return to this aspect. I find it appropriate to first deal with the point *in limine* that the Menzies' application is not urgent.

Urgency of Menzies application

[17] Mr Emile Anton Smith who deposed to the affidavit on behalf of Menzies avers that the urgency of its application is occasioned by the extraordinary unreasonable conduct of the Airports Company and the interest of Namibia's aviation industry which allegedly now stands at the brink of disaster. Mr Smith further avers that immediately after Justice Sibeya's order was handed down, Menzies and the Airports Company entered into a new agreement for Menzies to render the ground handling services until further notice. Mr Smith continues and avers that the Airports Company at approximately 15:00 on Friday, 9 June 2023 gave Menzies notice to vacate HKIA by close of airport operations on Monday, 12 June 2023. He contends that the four days' period is wholly unreasonable and thus renders the matter extremely urgent.

[18] Taking into account the fact that Justice Sibeya declared that Menzies' contract with the Namibia Airports Company terminated on 30 June 2022 and that Menzies had

[3] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (*State Capture*) para 87.

to vacate HKIA by end of airport's operations on that day and also that the Namibia Airports Company had all the right to enforce and execute the court's orders and could thus enlist the services of the law enforcement machinery of this Republic to enforce its right if Menzies had not vacated HKIA by the time demanded by the Airports Company, the only option Menzies had was to approach this court. The urgency with which Menzies had to approach this court to ward off the eminent forceful eviction from HKIA cannot be disputed. I therefore find that the matter is urgent and can be heard on an urgent basis as contemplated in Rule 73.

Lack of jurisdiction

[19] The second point *in limine* raised on behalf of Paragon is the contention by Mr Namandje that this court has no jurisdiction to make an order which has the effect to trim down or review another Judge's order. Accordingly, the court has no jurisdiction, so Mr Namandje argued.

[20] Based on the doctrine of *stare decisis,* Mr Namandje's argument that this court does not have jurisdiction to make an order which has the effect to trim down or review another Judge's order cannot be faulted and I agree with him. It is now acknowledged by our courts that the doctrine of precedent is an intrinsic feature of the rule of law[4]. This doctrine (*stare decisis*) is often expressed by in the Latin maxim *'stare decisis et non quieta movere'* (to stand by decisions and not to disturb settled matters).

[21] In *Gcaba v Minister for Safety and Security and Others*[5] the Constitutional Court of South Africa explained the maxim to mean that 'in the interest of certainty, equality before the law and the satisfaction of legitimate expectations, a court is bound by the previous decisions of a higher court and by its own previous decisions in similar matters.'

[22] In *Bloemfontein Town Council v Richter*[6] the then Appellate Division of South Africa held that:

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4 See *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) para 100.
5 *Gcaba v Minister for Safety and Security and Others* 2010 (l) SA 238 (CC) para 58.
6 *Bloemfontein Town Council v Richter* 1938 AD 195 at 232.

'The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors - such preference, if allowed, would produce endless uncertainty and confusion.'

[23] But in the present matter I do not understand that Menzies is seeking an order from this court which will have the effect to trim down or review Justice Sibeya's order. My understanding of the relief sought by Menzies, is that Menzies is seeking an order staying or, put otherwise, delaying the execution of Justice Sibeya's order of 29 June 2022 pending the determination of Menzies complaint that the Airports Company acted unreasonably and irrationally when it gave it three days' and 10 hours' notice to vacate HKIA.

[24] My understanding of the relief sought by Menzies brings me back to the question of the suspension or staying of the execution of a court order or judgment. Article 78(4) of the Namibian Constitution provides that:

' The Supreme Court and the High Court shall have the inherent jurisdiction which vested in the Supreme Court of South-West Africa immediately prior to the date of Independence, including the power to regulate their own procedures and to make court rules for that purpose.'

[25] The inherent power granted to this court by Article 78(4) has been interpreted to include the inherent discretion to order a suspension of the execution of any of its order or judgment. In *Road Accident Fund v Legal Practice Council and Others*[7] the court stated that superior courts have an 'inherent reservoir of power to regulate [their] procedures in the interests of the proper administration of justice': The court relying *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*[8] said:

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7 *Road Accident Fund v Legal Practice Council and Others* 2021 (6) SA 230 (GP).

8 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 462H – 463B per Botha J.

'I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.'

[26] In view of my understanding of the relief sought by Menzies in this application I come to the conclusion that this court does have the jurisdiction to consider the relief sought by Menzies in this application namely, the discretion to consider whether or not it will order a stay of execution of a judgment or court order. As Nepgen J said in *Whitfield v Van Aarde*[9]

'Execution is the process which enables a judgment creditor to obtain satisfaction of a judgment granted in his favour. The effect of holding that a Court is unable to control its own process would be to deprive a Court of what has always been considered to be an inherent power of such Court. Of course, the discretion which a Court has must be exercised judicially, but cannot be otherwise limited, for example by stating that such discretion can only be exercised in favour of a judgment debtor in certain circumscribed circumstances.'

Abuse of Court process

[27] The third point *in limine* raised by Mr Namandje is his contention that Menzies 'application is a complete abuse of the court's process.' Our courts have spoken quite emphatically about abuse of the courts' processes. In *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd,*[10] the Supreme Court pronounced itself as follows:

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[9] *Whitfield v Van Aarde* 1993 (1) SA 332 (E) at 337E – G.

[10] *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) para 18 to 25. I have omitted the number of the quote in order to avoid confusion with the numbering of the present matter.

'[18] The court has an inherent power to protect itself and other against an abuse of its process. As was said in *Hudson v Hudson and Another,* "when therefore the Court finds an attempt made to *use for ulterior purposes the machinery devised for the better administration of justice, i*t is the duty of the Court to prevent such abuse." The power to *prevent the abuse of the processes of the Court is an important tool in the hands of the court to protect the proper functioning of the courts and to prevent the judicial process from being abused by litigants who institute proceedings to harass their adversaries with vexatious litigation. It prevents the court from being turned into an instrument to perpetuate unfairness and injustice, and the administration of justice from being brought into disrepute.*

The exercise of this power protects the public interest in the proper administration of justice. As it has been said, albeit in a different context:

> "Public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by the State and citizen alike. And due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."

The primary function of a court of law is to dispense justice with impartiality and fairness both to the community that is serves. Public interest in the administration of justice requires that the court protect its ability to facilitate the resolution of genuine disputes. Unless the court protects its ability to function in that way, public confidence in the administration of justice may be eroded by a concern that the courts' processes may be used to perpetrate unfairness and injustice, and ultimately, this may undermine the rule of law. And public confidence in the courts is vital to the judicial function because as Justice Felix Frankfurter once reminded us, "(*t)he Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction*.

Abuse connotes improper use, that is, use for ulterior motives. And the term "abuse of process" connotes that "the process is employed for some purpose other than the attainment of the claim in the action". At times "vexatious" conduct of litigation is used synonymously with or as an instance of abuse of the process of court. In its legal sense, "vexatious" means "frivolous, improper; instituted without sufficient ground, to serve solely as an annoyance to the defendant.' What amounts to abuse of process is not susceptible to precise definition or

formulation comprising closed categories. Courts have understandably refrained from attempting to restrict abuse of process to defined and close categories.

While there can be no all-encompassing definition of the concept of *'abuse of process'* that is not to say that the concept of abuse is without meaning. It has been said that 'an attempt made to use for ulterior purposes machinery devised for the better administration of justice' would constitute an abuse of the process. In *Beinash v Wixley* the Supreme Court of Appeal in South Africa held that 'an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective'. In *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* it was held that '(i)n general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end'.

In *Walton v Gardiner* the high court of Australia held that the power to strike out an action on the grounds of abuse of process: extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.

As a general matter, an abuse of the process of the court occurs when the court process is used for improper purpose. But the mere use of a court process for a purpose other than that for which it was primarily intended does not establish abuse. In order to prove abuse more is required; it must be established that an improper result was intended. Thus, a plaintiff who has no bona fide claim but intends to use litigation to cause the defendant financial (or other) prejudice, will be abusing the process. Improper result or motive can be established by way of inference.' (Italicised and underlined for emphasis).

[28] In the present matter, Menzies contend that the three days' notice that it was given by the Airports Company is irrational and unreasonable and that it has come to court for a declaration to that effect and seeks an order to stay the execution of Justice Sibeya's order while that dispute (namely whether three days' notice is rational and reasonable) is being determined by the court. I have therefore come to the conclusion that, in the instant matter, Menzies is not using the machinery of the Court which is devised for the better administration of justice for ulterior purposes. I therefore find that Menzies' application does not amount to an abuse of the processes of the court.

Finality of the Supreme Court Order

[29] The fourth point *in limine* raised by Mr Namandje relates to the finality of the Supreme Court judgment. Mr Namandje argued that the Supreme Court order considered together with the order of Justice Sibeya is binding and final in terms of s 17 of the Supreme Court Act and the orders that Menzies seek are therefore incompetent and cannot be granted by this Court. He referred me to the case of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma*[11] where Khampepe J writing the majority judgment said:

'Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end. The Constitutional Court, as the highest court in the Republic, is constitutionally enjoined to act as the final arbiter in litigation. This role must not be misunderstood, mischaracterised, nor taken lightly, for the principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes'

[30] I wholeheartedly endorse the statement by Justice Khampepe. The question, however, is whether Menzies' application will or attempts to remove the oxygen from the rule of law thus suffocating it. The above quoted statement by Justice Khampepe must be considered in the unique factual setting of that matter. The factual setting of that matter is summarised as follows[12]:

'In this matter, this Court [that is, the Constitutional Court of south Africa] is being asked to rescind the judgment and order that it handed down in respect of contempt of court proceedings launched against former President Jacob Gedleyihlekisa Zuma for his failure to comply with an order of this Court. Ironically, the judgment now impugned, contains a thorough exposition of the rule of law and its fundamental importance to South Africa's constitutional democracy. Indeed, it says, "[n]o one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law" in South Africa. Yet, with the finality of its decision questioned, this Court, once again, finds itself tasked with defending the integrity of the rule of law.'

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[11] Supra footnote 3 para 1.
[12] Ibid para 2.

[31] The factual setting of the present matter is, in my view, entirely distinguishable from the *Zuma* matter. In the present matter Menzies did not come to this court asking the court to reconsider the correctness or otherwise of the orders of 29 June 2022 by Justice Sibeya or the correctness of the orders of 9 June 2023 of the Supreme Court. As I have indicated earlier my characterization and understanding of Menzies' application is that it is seeking an order to delay the execution of the order of Justice Sibeya while this Court is determining the question of whether the three days' notice that Menzies received from the Airports Company is rational, reasonable, fair and just.

[32] In my view the question whether or not the three days' notice given by the Airports Company to Menzies is rational, reasonable, fair and just has no bearing whatsoever on the finality of the Supreme Court's judgment. This court, as I indicated earlier in this judgment, is competent to, without violating the *stare decisis* doctrine or the finality of the Supreme Court's judgment, consider the question whether the Airports Company's three days' notice to Menzies to vacate HKIA is rational, reasonable, fair and just.

Violation of Airport Company's and Paragon's right of fair trial

[33] The fifth point *in limine* raised by Mr Namandje relates to the fair trial rights of the Airports Company and Paragon as guaranteed in Article 12 of the Constitution. He argued that the application can simply not be heard as it will result in a violation of Paragon's rights to a fair trial under Article 12 of the Namibian Constitution. Mr Heathcote who appeared for the applicant argued that the answer to this contention can be found in the matter of *Standard Bank of Namibia Ltd v Atlantic Meat Market*[13].

[34] The facts of the *Standard Bank v Atlantic Meat Market* matter are not entirely relevant to the present matter, but what is of relevance to the present application is that in that matter (*Atlantic Meat Market)* a company known as Atlantic Meat Market launched an application on 7 March 2005 on an urgent basis in this court for a *rule nisi* calling on the appellant to show cause why Standard Bank must not be interdicted and restrained from exercising any right in terms of the cession of book debts granted to it by Atlantic Meat Market.

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[13] *Standard Bank of Namibia Ltd v Atlantic Meat Market* 2014 (4) NR 1158 (SC).

[35] The application was delivered to Standard Bank's legal practitioners at 08h45 AM on Monday, 7 March 2005 and when the matter was called in court later that morning Standard Bank's counsel applied for a postponement for a week. Standard Bank was not prepared to give an undertaking sought by Atlantic Meat Market. The court refused the postponement and the respondent commenced with its argument. The court interrupted the argument a while later and postponed the matter to the following afternoon as it had another urgent matter on the roll. The hearing resumed on the following afternoon and after three days of argument, judgment was reserved and on 15 March 2005 judgment was handed down and an order granted on the basis sought by Atlantic Meat Market.

[36] Standard Bank appealed to the Supreme Court, although originally styled as an appeal against the order, it actually was an application to the Supreme Court that the refusal by the High Court to grant the postponement it requested in order to afford it more time to prepare and lodge answering affidavits, constituted an irregularity in the proceedings as contemplated in s 16(1) of the Supreme Court Act or violated Standard Bank's right to a fair hearing as an aspect of its rights to fundamental justice in common law or to a fair trial guaranteed by art 12(1)(a) of the Constitution.

[37] The Supreme Court held that regard being had to the inherent flexibility of the *audi alteram partem* rule, the High Court had properly moulded its application to meet the circumstances and address the exigencies of the application under consideration in the interests of fairness and justice. The Supreme Court further held that Standard Bank's common-law rights to fundamental fairness in the proceedings before the High Court were not violated and the manner in which the High Court applied the *audi* rule was procedurally right, just and fair in the context and circumstances of the case. Maritz JA who authored the court's judgment said:

'… some of the authorities cited by appellant, emphasise, 'the *audi alteram partem* rule cannot be separated from the context in which it is applied'. The procedural context in which it finds application in this case is that of an application brought on a basis of urgency for a *rule nisi,* coupled with an urgent interim interdict. The granting of a *rule nisi* in appropriate cases is, as Corbett JA remarked in *Safcor Forwarding (Johannesburg) (Pty) Ltd v National*

Transport Commission, 'firmly embedded in our procedural law' even though not substantively provided for in the rules of court. He continued:

"The procedure of a *rule nisi* is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, *prima facie*, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons. … In fact, the *rule nisi* procedure does make it possible for the application to come before the Court for adjudication more speedily than the usual procedures for the set down of applications or trials, and it does, in a proper case, permit of the granting of interim relief."

… Our common-law has recognised both the great importance of the *audi rule* as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the very rights sought to be enforced or protected. In such circumstances, the court issues a *rule nisi* calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final, and at same time orders that the *rule nisi* should act immediately as a temporary order, pending the return day. This practice has been recognised by the South African courts for over a century:

"The term *'rule nisi'* is derived from English law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted… The flexibility and utility of the *rule nisi* acting at the same time as an interim order, has been recognised by the courts and it has been applied to modern problems in commercial suits"

… the issuing of a *rule nisi* is neither a final nor definitive determination of the rights of the parties in the application. By its nature, the rule does not dispose of the relief being sought — that may only happen on the return day of the rule or, depending on the nature of the relief, in the main proceedings. Generally, if, due to the urgency and exigencies of the matter, it is directed that the *rule nisi,* or any part thereof, should apply immediately as a temporary order without first according other affected or interested parties an opportunity to answer to the allegations that underpin the relief, such parties are expressly called upon by the court 'to show cause' before the return date why the relief as set out therein should not be granted.

Thus, they are thereby granted an opportunity to state their case in opposition to the application before the relief being sought is finally determined.'

[38] On the authority of *Standard Bank v Atlantic Meat Market,* I find that if this court hears the matter and issues a *rule nisi* the Airports Company and Paragon's right to a fair trial as guaranteed under Article 12 of the Constitution will not be violated.

Absence of Public Law decision by the Airports Company

[39] The sixth and last point *in limine* raised by Mr Namandje relates to the absence of a public law decision, made by the Airports Company after the Supreme Court order, which could be open for a review. He argued that the court order of Justice Sibeya was operative and its implementation is with immediate effect. He further argued that Menzies asked for more time before Justice Sibeya and further relied on the Rent Ordinance but Menzies' pleas in this respect were finally and conclusively rejected. Hence, the issue of more time before eviction is *res judicata* between the parties, argued Mr Namandje.

[40] The doctrine of *res judicata,* is a legal principle that states that a matter that has been finally determined by a court of competent jurisdiction cannot be re-litigated by the same parties or their privies in a later suit. In *S K v S K*[14] Prinsloo J stated that *res judicata* is a Latin term meaning "a thing adjudicated". This refers to an issue that has been definitely settled by judicial decision. The doctrine thus bars the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction that could have been but was not raised in the first suit.

[41] The learned judge proceeded and set out the essential elements of *res judicata.* She stated that the essential elements are threefold, namely that the previous judgment was given in an action or application by a competent court; between the same parties, based on the same cause of action (*ex eadem petendi causa*), and with respect to the same subject-matter, or thing (*de eadem re*). She further stated that the second and third requirements are not immutable requirements of *res judicata*. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.

[14] *SK v SK* (I 3754/ 2012) [2017] NAHCMD 344 (17 November 2017).

[42] In *The General Consulate of the Republic of Angola in Rundu v Van Schalkwyk*[15] Prinsloo J reasoned that the concept of *res judicata* ascended as a method of preventing injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources in the court system. *Res judicata* does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments and confusion. Relying on *Coetzee v Eva Salt Traders and Four Others*[16] the learned judge opined that the true basis of the doctrine is to prevent an abuse of the process.

[43] The learned judge further said the effect of the final judgment on a party's cause of action has been described as follows:

> 'The effect of a final judgment on a claim is to render the claimant's cause of action *res judicata.* If therefore a party with a single cause of action giving rise to a single claim obtains a final judgment on part of his claim, the judgment puts an end to his whole cause of action, with the result that a subsequent claim for the balance of what is his cause of action entitled him to claim in the first instance can be met with a plea of *res judicata*. When a cause of action gives rise to more than one remedy, a plaintiff who pursues one of those remedies and obtains a judgment thereon can be met with a plea of res judicata if he should subsequently seek to pursue one of the other remedies, the reason being that the final judgment on part of one's cause of action puts an end to the whole of such cause of action.'[17]

[44] In the present matter Menzies contends that after Justice Sibeya granted the declaratory orders on 29 June 2022, it and the Airports Company entered into another agreement in terms of which they agreed that 'Menzies Aviation will continue to provide ground handling services at the HKIA until further notice'. If this allegation by Menzies is found to be established then the issue of *res judicata* does, in my view, not arise because then the question of whether the three days' notice that the Airport's Company gave Menzies to vacate HKIA is reasonable or not was never determined by either Justice Sibeya or the Supreme Court.

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[15] *The General Consulate of the Republic of Angola in Rundu v Van Schalkwyk* (HC-MD-CIV-CON-2020/01309) [2020] NAHCMD 560 (4 December 2020).

[16] *Coetzee v Eva Salt Traders and Four Others* (I 2728/2012) [2016] NAHCMD 359 (8 November 2016).

[17] *Ekonolux CC and another v Shadjanale* (I 905/2014) [2016] NAHCMD 173 (16 June 2016).

[45] In light of the reasons that I have set out, the findings that I have made and conclusions that I have reached in the preceding paragraphs, I am of the view that the points *in limine* raised must fail and do fail.

[46] I therefore make the following order:

1 The second respondents' points *in limine* are dismissed.

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

3 Any respondent who intends to oppose this application must file it answering affidavit by not later than 23 June 2023.

4 The applicant must, if so advised, file its replying affidavit by not later than 26 June 2023.

5 The applicant must file its heads of arguments by not later than 28 June 2023.

6 The respondents who oppose this matter must file their heads of arguments by not later than 01 July 2023.

7 The matter is postponed for hearing on 04 July 2023 at 11h00.

8 The orders issued by Justice Sibeya on 29 June 2022 under case number HC-MD-CIV-MOT-GEN-2022/00233, are suspended pending the determination of the dispute under this application.

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S F I UEITELE

JUDGE

APPEARANCES:

APPLICANT:	R Heathcote SC, with him JP Jones Instructed by Viljoen & Associates, Windhoek
FIRST RESPONDENT:	U Hengari Instructed by Shikongo Law Chambers, Windhoek
SECOND RESEPONDENT:	S Namandje, with him Taimi Ileka -Amupanda Of Sisa Namandje & Co Inc, Windhoek