REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case number: HC-MD-CIV-MOT-EXP-2023/00169
INT-HC-OTH-2024/00353

In the matter between:

LEWFIN HOLDINGS (PTY) LTD	**1ST APPLICANT**
JANEEL FINANCIAL SERVICES CC	**2ND APPLICANT**
ONE STOP CASH LOAN CC	**3RD APPLICANT**
CASHPLUS CASH LOAN CC	**4TH APPLICANT**
MR CASH CC	**5TH APPLICANT**
DUPWIES FINANCIAL SERVICES CC	**6TH APPLICANT**
OMBATERO FINANCIAL SERVICES CC	**7TH APPLICANT**
FOCUS FINANCE (PTY) LTD	**8TH APPLICANT**
PIONEER FINANCE COMPANY (PTY) LTD	**9TH APPLICANT**
DUPWIES MANAGEMENT SERVICES CC	**10TH APPLICANT**

and

PAUSE FINANCIAL SERVICES CC	**1ST RESPONDENT**
JOSEPHINE LAZARUS	**2ND RESPONDENT**
LEVI SIMON	**3RD RESPONDENT**

Neutral citation: *Lewfin Holdings (Pty) Ltd v Pause Financial Services CC*

(HC-MD-CIV-MOT-EXP-2023/00169) [2024] NAHCMD 597 (14 October 2024)

Coram: DE JAGER J
Heard: **23 September 2024**
Delivered: **14 October 2024**

Flynote: Court – High Court – Power – Stay proceedings – Interest of justice not part of common law grounds to stay proceedings – No case made for need to develop common law grounds to include interest of justice ground.

Summary: Before the court serves an application that the proceedings in the main application be stayed pending finalisation of the applicants' appeal to the Namibia Financial Institutions Supervisory Authority (NAMFISA) appeal board (the appeal). The main application is for the confirmation of an Anton Piller rule nisi order obtained on an urgent ex parte basis to preserve evidence – that the first respondent unlawfully took the applicants' employees over and, with their assistance, unlawfully took the applicants' confidential documents and clients – to be used in an intended action for delictual damages against the respondents for loss of income and reputational damage. The second to ninth applicants and the first respondent are registered microlenders with NAMFISA, and they conduct rival businesses as microlenders. The applicants allege the respondent contravened section 21 of the Microlending Act 7 of 2018 (the Act) in that they may not, without NAMFISA's prior written approval, have opened additional microlending branches. The appeal lies against NAMFISA's decisions to approve the first respondent's previously unapproved branches and decline imposing sanctions against the first respondent. According to the applicants, NAMFISA's decisions have a significant bearing on the main application. The first respondent opposed the application. They say the common law requirements for the stay of proceedings were not satisfied, the application is brought on the basis that it is in the interest of justice, which basis does not exist under Namibian law, and the appeal's outcome is irrelevant to the main application.

Held that, under the prevailing common law in Namibia, the court does not have the power to stay proceedings in the interest of justice.

Held that, the applicants effectively sought to develop the common law on stay of proceedings to include the interest of justice as one of the instances in which the court may stay proceedings, but they failed to justify a need to develop the common law.

Held that, the issues before the appeal board and those before the court in the Anton Piller rule nisi order are different.

Held that, the confirmation or discharge of the Anton Piller rule nisi order, with an intended damages suit in mind, would have no bearing on NAMFISA's authority or findings in the applicants' appeal, their jurisdiction would not be usurped thereby as the Anton Piller rule nisi order's confirmation or discharge will not include any orders about the first respondent's alleged contraventions of the Act or the consequences thereof and it will not be based on or depend on the validity of NAMFISA's decisions.

Held that, whether to confirm or discharge the Anton Piller rule nisi order concerns the question of whether the applicants established a prima facie case that they have a cause of action against the respondents in the intended damages suit for allegedly unlawfully having taken the applicants' employees over and, with their assistance, unlawfully having taken the applicants' confidential documents and clients, which conduct gave rise to an action for delictual damages against the respondents for loss of income and reputational damage. The first respondent's alleged conduct of contravening specific statutory provisions of the Act and the consequences thereof, which forms the subject matter of the appeal, would not arise in the main application. Whether the applicants contravened the Act is irrelevant to whether the applicants are entitled to a final Anton Piller order.

ORDER

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1. The application under INT-HC-OTH-2024/00353 is dismissed.

2. The applicants must pay the first respondent's costs occasioned by the application under INT-HC-OTH-2024/00353 jointly and severally, the one paying the others to be absolved, including the costs of one instructing and two instructed legal practitioners, uncapped under rule 32(11).

The matter under INT-HC-OTH-2024/00353 is finalised and removed from the roll.

JUDGMENT

DE JAGER J:

Introduction and background

[1] Before the court serves an application that the proceedings under HC-MD-CIV-MOT-EXP-2023/00169 be stayed pending finalisation of the applicants' appeal of 14 June 2024 to the Namibia Financial Institutions Supervisory Authority (NAMFISA) appeal board (the appeal) and that the costs of the present application (the stay application) be costs in the cause (the main application).

[2] The first respondent opposed the application on three grounds. Firstly, the common law requirements for the stay of proceedings were not satisfied, and the application is brought on the basis that it is in the interest of justice, which basis does not exist under Namibian law. Secondly, the stay application

aims to exclude the first respondent's opposition to the main application on an incorrect application of the unclean hands doctrine. Thirdly, the outcome of the appeal is irrelevant to the main application to preserve evidence – that the first respondent unlawfully took the applicants' employees over and, with their assistance, unlawfully took the applicants' confidential documents and clients – to be used in an action for delictual damages against the respondents for loss of income and reputational damage.

[3] The proceedings under HC-MD-CIV-MOT-EXP-2023/00169 for an Anton Piller rule nisi order were initiated on 18 April 2023 as an urgent ex parte application (the main application).

[4] The first to tenth applicants in the main application, who are also the first to tenth applicants in the stay application, are Lewfin Holdings (Pty) Ltd, Janeel Financial Services CC, One Stop Cash Loan CC, Cashplus Cash Loan CC, Mr Cash CC, Dupwies Financial Services CC, Ombatero Financial Services, Focus Finance (Pty) Ltd, Pioneer Finance Company (Pty Ltd and Dupwies Management Services CC, respectively. The second to ninth applicants are registered microlenders with NAMFISA and conduct business as microlenders.

[5] The first to third respondents in both applications are Pause Financial Services CC, Josephine Lazarus and Levi Simon, respectively. The first respondent also conducts business as a microlender. The first respondent and the applicants are competitors in the field of microlending. The applicants allege that the first respondent conducts its microlending business unlawfully in contravention of section 21 of the Microlending Act 7 of 2018 (the Act) in that a microlender may not, without NAMFISA's prior written approval, open additional microlending branches. According to the applicants, the first respondent only has two branches registered with NAMFISA, but they operate six branches at specified addresses.

[6] The second and third respondents are employees of the first respondent and were previously employed by the applicants. They allegedly terminated their employment contracts with the applicants without notice to immediately commence employment with the first respondent. While employed by the

applicants, they were introduced to their clientele, had access to their confidential information, formed personal relationships with the applicants' other employees and gained intimate knowledge of the applicants' operations.

[7] The purpose of the main application is to seek an order whereby authority is granted to search for and attach the applicants' confidential information and/or documents in the first respondent's possession that infringe on the applicants' rights as well as further documents which are strictly necessary to prove the infringements and to preserve the confidential information and/or documents as evidence. Its related purpose is to allow the applicants to use it as evidence in further legal proceedings to be instituted. The applicants feared that the confidential information and documents might be hidden, destroyed or disposed of and unavailable as evidence.

[8] Following the applicants' success in having the main application heard urgently, an order was granted on 19 April 2023 in the following terms:

(a) A rule nisi is issued calling on the respondents or any other interested party to show cause, on or before 5 May 2023 at 10:00, why an order should not be made in the following terms:

(i) The deputy sheriff is authorised and directed to enter six specified premises (the premises) of the first respondent together with certain representatives of the applicants (the representatives), and the first respondent is directed to allow the deputy sheriff and the representatives to enter the premises.

(ii) The representatives are authorised to assist the deputy sheriff in locating and pointing out to the deputy sheriff the documents identified in CJL(A) attached to the notice of motion (the documents) at the premises.

(iii) The first respondent and their employees are directed to point out and hand over the documents to the deputy sheriff. If their originals or hard copies are unavailable, they are directed to print them out and hand the printouts over to the deputy sheriff.

(iv) The deputy sheriff is authorised and directed to remove all documents handed over and to retain them.

(v) The applicants shall only be entitled to access those documents and, at their own cost, to make copies thereof after confirmation of the rule nisi (if confirmed).

(vi) The deputy sheriff is authorised and ordered to use the services of a locksmith and to call on the Namibian Police to assist in executing the order if the deputy sheriff reasonably deems it necessary.

(vii) The costs of the application, including the costs of one instructing and two instructed counsel, 'shall not' be borne by the first respondent.

(b) The orders in paragraphs (i) to (vi) above shall, pending confirmation of the rule nisi, operate as an interim order with immediate effect but subject to the proviso in paragraph (v) above and its execution shall further be governed by the following:

(i) Execution shall be supervised by an independent admitted legal practitioner of the court who shall ensure that the premises searched shall not be searched for items or information not set out in CLJ(A) and prepare a list of all items removed from the premises and shall grant any representative of the first respondent in charge of each of the premises an opportunity to check the list before such removal.

(ii) The independent legal practitioner shall prepare a concise report describing how the order was complied with and file the report with the registrar no later than noon on the day but one preceding the return day of the rule nisi and ensure that a copy thereof is delivered to the applicants and the first respondent or their legal practitioner appointed for such purpose.

(iii) The reasonable fees, costs and expenses of the independent legal practitioner incurred in the execution of their functions and duties set out above shall be paid by the applicants but shall be part of the costs in the cause of the application and be recoverable by the applicants on that basis.

(c) A copy of the order shall be served on the first respondent at the six premises immediately before the execution process set out above commences, and service of the notice of motion and all affidavits and annexures used in support thereof together with the order shall as soon as is practical after that be served on the respondents and NAMFISA.

(d) The parties in the preceding paragraph are entitled to anticipate any rule nisi issued in the case on not less than 24 hours' notice as provided in rule 72(7).

[9] The rule nisi order was executed. The respondents opposed its confirmation. Answering papers and replying papers were delivered in the main application in June and August 2023. Various independent legal practitioners filed reports on the execution of the order, and the respondents filed answering affidavits to those affidavits.

[10] On 20 March 2024, the respondents were granted leave, by agreement between the parties, to deliver a further affidavit, and directions were given, by agreement, to deliver the further affidavit and the answering affidavit to it. The main application was set down for hearing on 10 June 2024. The respondents' further affidavit was delivered to place new facts before court about NAMFISA's favourable decision to the first respondent, which did not exist when the answering papers were filed, and to respond to new matter introduced in the applicants' replying papers. The applicants failed to deliver their answering affidavit to that further affidavit. Instead, they approached the court to vacate the hearing date as they intended to bring the stay application. The hearing of the main application did not continue, and the applicants were ordered to pay the respondents' costs occasioned thereby on an attorney-client cost scale.

[11] The appeal lies against NAMFISA's decisions, which are set out in their letter to the applicants dated 18 July 2023 and letters to the first respondent, two of which are dated 28 August 2023 and another dated 29 August 2023.

(a) In the first letter of 18 July 2023, NAMFISA indicated the following. None of the allegations in the applicants' complaint about the first respondent to

NAMFISA constitutes proof of non-compliance with the Act by the first respondent. The complaint creates no basis on which NAMFISA would be entitled to direct the first respondent to summarily suspend its microlending business under section 13(6) of the Act. NAMFISA will investigate founded allegations, and the applicants are invited to provide evidence of the allegations in their complaint. The complaint stems from the same facts as the main application in which judgment is pending and the matter is sub judice. If NAMFISA lodges any investigation into the first respondent's conduct, the applicants will not be appraised thereof or its outcome due to provisions in the Act generally prohibiting information disclosure.

(b) The second letter to the first respondent, dated 28 August 2023, notes the unlawful activities and the reasons advanced by the first respondent.

(c) The third letter to the first respondent dated 28 August 2023, approves the first respondent's application for opening additional microlending branches.

(d) The fourth letter to the first respondent dated 29 August 2023, approves the first respondent's application for conducting the business of Mutua Scriba Architects at certain licenced premises of the first respondent.

<u>The applicant's case</u>

[12] According to the founding affidavit, the grounds for the stay application are as follows.

(a) The stay application is made in good faith.

(b) The first respondent, in their answering affidavit to the main application, admitted conducting microlending business in contravention of section 21 of the Act and disclosed the following information. The first respondent informed NAMFISA about the ongoing issues. They consistently adhered to the statutory requirements and submitted quarterly reports to NAMFISA. They closed their Rundu and Government Park branches pending NAMFISA's approval. Their Sanlam branch remains open for consultations with applications vetted by their Village branch. Their main branch was approved by NAMFISA, and the

operation of the smaller branches without the required approval was based on a misunderstanding that approval would follow as a matter of course. They informed NAMFISA about the status of their branches. The Walvis Bay branch never operated. NAMFISA was aware of all relevant facts.

(c) NAMFISA cannot condone unlawful conduct or conduct contravening the Act, and any decision to that effect is unlawful.

(d) The first respondent approached the court with unclean hands, so their opposition must be dismissed.

(e) After receiving the first respondent's answering affidavit in the main application, the applicants complained to NAMFISA about the first respondent's unlawful business operations with specific references to the Act and requested NAMFISA to investigate the complaints and possible financial crimes under section 37(7)*(c)* of the Act. NAMFISA responded with the first letter referenced above, and their position is erroneous and misleading as it creates the impression that they would not, pending the judgment in the main application, take any steps or make a decision, but despite that position, they made a decision which condoned the first respondent's unlawful activities.

(f) On 18 July 2023, NAMFISA nevertheless initiated an investigation into the first respondent's unapproved branches, allegedly because the first respondent had previously reported themselves to NAMFISA.

(g) The letters of 28 and 29 August 2023 referenced above were attached to the first respondent's further affidavit of 12 April 2024, and it was only therein that the first respondent revealed their reliance on those letters for their purge defence, and that was the first opportunity the applicants had to consider their contents and the purge defence and to contemplate any consequent action such as an appeal or a review. The first respondent aims to show they are now compliant with the relevant regulations and that any prior issues have been addressed, thereby undermining the applicants' arguments about their alleged misconduct and non-compliance. The first respondent says NAMFISA's correspondence aids them.

(h) Whether to stay proceedings is always a matter of discretion.

(i) Where both civil and criminal proceedings arise from the same circumstances, the usual practice is to stay the civil proceedings until the criminal proceedings are disposed of. An integral part of the applicants' complaint relates to matters constituting criminal offences under the Act. Therefore, the relief sought in the appeal includes an order that the first respondent's conduct be referred to the Prosecutor General to consider criminal prosecution under sections 21(14)[1] and 20(6)[2] of the Act.

(j) Granting a stay is in the interest of justice. NAMFISA's decisions dated 28 and 29 August 2023 have a significant bearing on the main application. The applicants' appeal against those decisions, noted on 14 July 2024, questions their validity and seeks redress for prejudices suffered. Those decisions are central to the first respondent's defence in the main application. Should the appeal succeed, the decisions relied on by the first respondent to argue their compliance would be invalidated, fundamentally altering the case's dynamics. That ensures that the respondents do not benefit from potentially unlawful decisions and that the premature continuation of the main application does not unfairly disadvantage the applicants.

(k) If the stay is granted, the respondents will suffer limited prejudice, but the applicants will suffer substantial prejudice if it is refused.

<u>The first respondent's opposition</u>

[13] The first respondent submits, because of the following, the stay application has no merit.

(a) No criminal proceedings are pending, and the accused (or potential accused) is not seeking the stay. The complainant is seeking a stay. The court's power to stay proceedings is exercised sparingly and only in exceptional cases when substantial grounds justify a stay of proceedings. In the appeal, the

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[1] For the operation of additional branches without NAMFISA's prior written approval.

[2] For conducting other business (architectural business) from premises of microlending business without NAMFISA's prior written approval.

applicants submit the first respondent should be found guilty of various contraventions of the Act, which is entirely without merit because a stay is granted where the administration of criminal justice is likely to be hampered or if an accused can show they might be prejudiced in the criminal proceedings should the civil proceedings not be stayed and heard first. Where there is uncertainty if criminal proceedings will be instituted, the court will generally not interfere except on very cogent grounds. The high-water mark of the applicants' case is they might succeed in the appeal and then obtain evidence of the third respondent's dirty hands which they might use to bolster their case. The first respondent says the applicants failed to make a case that a failure to stay the main application would hamper the administration of criminal justice.

(b) Under peremptory statutory provisions, the appeal must have been lodged within 14 days after notification of the decision. Assuming the applicants received the 18 July 2023 letter on 18 July 2023, the appeal for that decision was due on 1 August 2023. In the replying affidavit to the main application delivered on 11 August 2023, the applicants stated they were advised that NAMFISA adopted an incorrect approach to the complaint and that their legal position was incorrect. Yet, they did not appeal at that time. The appeal was lodged months out of time on 14 June 2024. The applicants failed to apply for the required condonation for the late filing of the appeal, and it is unlikely that condonation would be granted because it would be unreasonable to do so. For the other three letters, the fourteen days must be calculated from when the applicants received the letters, not from when the first respondent relied on them, as the applicants allege. The applicants failed to state when they received those three letters. By 6 September 2023, the applicants knew that the first respondent's four branches complained about were approved. If calculated from 6 September 2023, the appeals against the decisions in the remaining three letters had to be filed by 20 September 2023. On the appeal form, the applicants' deponent stated the date the decisions were received was 15 April 2024 through the first respondent's affidavit dated 12 April 2024, which statement is false. Amongst others, the letters were attached to the first respondent's affidavit of 28 February 2024. Thus, there is no appeal, and the

purported appeal is an afterthought aimed at delaying finalisation of the main application.

(c) The stay application was launched more than nine months late. That manifest delay was left unexplained. About ten months before the appeal and the stay application, the applicants knew NAMFISA approved the first respondent's previously unapproved branches but did nothing to challenge that decision.

(d) The applicants are delaying finalisation of the main application. The applicants knew about NAMFISA's decisions in September 2023, and their precise terms were known on 28 February 2024. The appeal was lodged more than four months after the applicants received copies of NAMFISA's decisions. The applicants belatedly applied for a postponement of the main application. The main application was launched in April 2023 already. If the appeal proceeds, it is unlikely that a decision will be handed down before the end of 2024. A judgment in the main application will only be handed down in the first quarter of 2025, two years after the main application was launched. That is highly prejudicial to the first respondent in reaching finality. In that context, the stay application amounts to an abuse of court process.

(e) The applicants misapply the doctrine of unclean hands, which precludes a person from approaching a court for relief if the person acted unlawfully and dishonestly and where fraud or mala fides are proven. The doctrine cannot prevent the applicant from opposing the main application, and, in any event, no case was made for its application to the main application's facts. The doctrine does not find application simply when legislation is contravened. It applies if there is dishonesty, fraud or mala fides on the part of the litigant approaching the court for relief.

(f) The issues set out in the founding affidavit that gave rise to the applicants seeking the Anton Piller order and the purpose of the main application are unrelated to NAMFISA's decisions to approve the first respondent's previously unapproved branches and their decision not to sanction the first respondent. The first respondent's operation of unapproved branches

was used in the main application only to support bringing that application ex parte, not in the context of relevance to the merits of the main application. The stated purpose of the appeal is irrelevant to the main application.

[14] In reply, the applicants stated the following.

(a) The first respondent distorts the truth saying the applicants knew from about ten months before the appeal that NAMFISA approved the previously unapproved branches.

(b) The appeal was noted in time, and out of caution, a conditional condonation application was filed shortly after its noting. The applicants say they have not received notification of the impugned decisions, and the period to note an appeal has not commenced. The 18 July 2023 letter was received on even date, and the other three letters were received on 28 February 2024 as part of the first respondent's affidavit in interlocutory proceedings to the main application, but it was only in the 12 April 2024 affidavit, filed on 15 April 2024, that the first respondent revealed their reliance on those letters for their purge defence.

(c) The basis for the stay application is that the applicants will be significantly prejudiced in the main application if the proceedings are not stayed. They seek, in the interest of justice, the opportunity to establish the validity of NAMFISA's decisions and if the decision to register the unlawfully trading branches is valid, whether its effect includes that they retroactively condone and nullify all illegal actions, thereby disposing of the doctrine of unclean hands. The interest of justice idea is broad, and it may include a stay pending an appeal of an administrative decision, the outcome of which will have a material effect on the discharge of the applicants' onus in the matter.

(d) The fundamental purpose of the stay is to ensure that the main proceedings do not proceed based on potentially flawed administrative decisions. They say allowing the main application to proceed could lead to substantial and irreparable damage to their business operations and their efforts to maintain regulatory compliance.

The determination

[15] The first respondent referred the court to the following principles of stay applications set out in *Herbstein and Winsen The Civil Practice of the Supreme Court of South Africa:*[3]

> 'Our superior courts possess inherent jurisdiction to prevent abuse of their process by staying proceedings in certain circumstances, but the power to do so will be exercised sparingly and only in exceptional cases.[4] This should be done with very great caution, and only in a clear case.[5] . . . .
> Strong grounds must be shown to justify a court in staying an action, for 'the courts of law are open to all, and it is only in very clear exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action' . . . Although a stay of proceedings can be ordered when the proceedings are vexatious or an abuse of the process of court, a stay cannot be granted in the exercise of the court's discretion merely to avoid injustice and inequity.'

[16] The parties are ad idem that the court's power to stay proceedings will be exercised sparingly and with great caution, only in exceptional and clear cases, and strong grounds must be shown to justify it. The bone of contention between them is whether proceedings may be stayed in the interest of justice.

[17] Van Winsen, Cilliers and Loots deal with the cases in which a temporary stay of proceedings may be granted, which is lis pendens, when criminal proceedings are pending, when previous costs are unpaid, when parties agreed to arbitration and special matters (companies in liquidation, insolvency, interpleader proceedings, special cases and adjudication upon points of law under the rules of court, death of a party, insanity or incompetence of a party and security for costs).[6]

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[3] Van Winsen, Cilliers and Loots *Herbstein and Winsen The Civil Practice of the Supreme Court of South Africa* 4ed at page 245.
[4] *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274; *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 518; *Hudson v Hudson & another* 1927 AD 259 at 267.
[5] *Fisheries Development Corporation of SA Ltd v Jorgensen & another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & others* 1979 (3) SA 1331 (W) at 1338.
[6] At page 248 to 278.

[18] The first respondent argued the stay application fails to satisfy any of the common law requirements, it does not fall into any of the recognised categories and on the legal principles set out above, it must be dismissed. They further argued the basis on which it is brought, that it is in the interest of justice, does not exist in Namibian law. They contend the stay application impermissibly aims to exclude their opposition in the main application. Lastly, they submitted the appeal is irrelevant to the main application.

[19] The applicants relied on *Mokone v Tassos Properties CC and Another,*[7] to propose that proceedings may be stayed in the interest of justice. The South Africa Constitutional Court said that based on Article 173 of the South African Constitution, it does not see why proceedings may not be stayed on grounds dictated by the interest of justice. It said that the South African Constitution lays down its own test, which has everything to do with the interest of justice. It further said in that context, the idea of interest of justice is broad, and what justice requires will depend on the circumstances of a case.

[20] Article 173 of the South African Constitution reads as follows:

> 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[21] The Namibian Constitution's counterpart, Article 78(4), does not include the phrase 'taking into account the interests of justice'. It reads:

> '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.'

[22] In *Menzies Aviation (Namibia) (Pty) Limited v Namibia Airports Company Limited,*[8] the Supreme Court cautioned against blindly following South African

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[7] *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC) paras 66 to 68.
[8] *Menzies Aviation (Namibia) (Pty) Limited v Namibia Airports Company Limited* 2024 JDR 2990 (NmS) para 21.

authorities based on the 'interests of justice' provision found in the South African Constitution but not in the Namibian Constitution.

[23] The first respondent argued under Namibian law, a stay application can only be granted if the common law requirements are met and not on the broad concept of the interest of justice. The applicants said the first respondent failed to deal with the part in *Menzies Aviation (Namibia) (Pty) Limited v Namibia Airports Company Limited,* stating that the court has the inherent jurisdiction to develop the common law to meet modern exigencies.[9]

[24] Under the prevailing common law in Namibia, the court does not have the power to stay proceedings in the interest of justice.

[25] The applicants effectively seek to develop the common law on stay of proceedings to include the interest of justice as one of the instances in which the court may stay proceedings. To succeed, the applicants had to justify a need to develop the common law.[10] They failed to do so. The applicants further failed to consider or appreciate the differences in Articles 173 and 78(4) of the South African and Namibian Constitutions, respectively.

[26] In their heads of argument, the applicants stated that the stay is sought under the common law, but immediately after that, they said it is premised on the interest of justice requiring a stay. The applicants are either conflating issues of law (existing common law grounds and the interest of justice ground), or they (incorrectly) assume that proceedings may be stayed under the common law if it is in the interest of justice to do so. They argued, from the outset, in their heads of argument, that the court may order a stay where it is in the interests of justice to do so. That is not the position under the prevailing common law in Namibia.

[27] The court now considers the applicants' arguments insofar as they may fall under the common law, as alleged by the applicants' conflated argument.

[28] The applicants argued the stay is sought to prevent the first respondent from abusing the process by using their alleged purging of unclean hands

[9] Para 21.

[10] *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC and Another* 2017 (1) NR 1 (SC) para 73.

based on unlawful decisions to evade the doctrine of unclean hands to be applied. They say NAMFISA's decisions remain effective until set aside, and the first respondent relies on those decisions to defend the allegations of unclean hands. In oral argument, the applicants submitted they do not persist with reliance on the unclean hands doctrine for the stay application save to use it to show the first respondent's state of mind as their way of doing business is material to the case. That aspect is thus not dealt with by the court.

[29] The applicants further argued if the main application proceeds, the appeal board's authority may be undermined or its findings pre-empted, the court should not usurp the appeal board's jurisdiction to deal with the disputes therein and conflicting judgments could ensue. Continuing with the main application may result in the court making an order based on decisions later overturned by the appeal board, rendering any subsequent steps invalid or necessitating costly reversals and re-litigation, so they said. In reply during oral argument, the applicants relied on section 47(5) of the Namibia Financial Institutions Supervisory Authority Act 3 of 2021, which states that an appeal board decision has legal force and effect and may be enforced as if it were issued in civil proceedings in a court. Therefore, it is wrong to say that NAMFISA is not a court, so they said.

[30] The issues before the appeal board and those before the court in the Anton Piller order are different. The appeal concerns the first respondent's alleged contraventions of the Act and the consequences thereof in the context of the regulator authority. The Anton Piller order concerns the preservation of evidence to be used in an intended damages suit by the applicants against the respondents. The court's confirmation or discharge of the Anton Piller order, with an intended damages suit in mind, would have no bearing on the regulator's authority or findings, and their jurisdiction would not be usurped thereby as the Anton Piller order's confirmation or discharge will not include any orders about the first respondent's alleged contraventions of the Act or the consequences thereof. The Anton Piller order's confirmation or discharge will not be based on NAMFISA's decisions.

[31] Corbett JA summarised the requirements for an Anton Piller order as follows in *Universal City Studios v Inc V Network Video (Pty) Ltd:*[11]

> 'In a case where the applicant can establish prima facie that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the Court to make an order designed to preserve the evidence in some way . . . .'

[32] The court will consider those requirements when deciding whether to confirm or discharge the Anton Piller rule nisi order. The applicants must establish a prima facie case that they have a cause of action against the respondents in the intended damages suit against them. The cause of the applicants' intended damages suit is that the first respondent unlawfully took the applicants' employees over and, with their assistance, unlawfully took the applicants' confidential documents and clients, and that conduct gave rise to an action for delictual damages against the respondents for loss of income and reputational damage. The first respondent's alleged conduct of contravening specific statutory provisions and the consequences thereof would not arise in the main application.

[33] In oral argument, the applicants argued that if the main proceedings are not stayed, they must answer the first respondent's further affidavit, and the *Oudekraal* principle will prevent them from presenting their version to the court.

[34] The fact remains that the confirmation or discharge of the Anton Piller rule nisi order will not depend on the validity of NAMFISA's decisions. The confirmation or discharge of the Anton Piller rule nisi order will be aimed at whether the evidence must be preserved pending finalisation of the intended damages claim. With reference to *Minister of Mines and Energy and Others v Black Range Mining (Pty),*[12] the first respondent argued that whether they

[11] *Universal City Studios v Inc V Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 755A-C.
[12] *Minister of Mines and Energy and Others v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC) para 49.

contravened the Act is irrelevant to whether the applicants are entitled to a final Anton Piller order. The court agrees with that submission.

[35] As a result, the application cannot succeed.

[36] The first respondent prays that the application be dismissed with costs of one instructing and two instructed legal practitioners uncapped under rule 32(11) on a scale of attorney and client. They say the case's circumstances justify a departure from rule 32(11). The parties are litigating with equality of arms. The misconceived nature of the application and the abuse of process are appropriate grounds to seek costs on a punitive cost scale, so they said. The applicants argued that costs should be in the cause.

[37] There is no reason why the costs of the stay application should be in the cause instead of following its event. The stay application concerns a novel issue insofar as a stay is sought in the interest of justice. The main application concerns relatively uncommon Anton Piller proceedings and its nature impacts the stay application. The record is voluminous. Both parties employed junior and senior instructed counsel, which was justified. In those circumstances, the court exercises its discretion that the costs should be uncapped under rule 32(11) but not on a punitive cost scale, as no case was made for it.

[38] In conclusion, it is ordered that:

1. The application under INT-HC-OTH-2024/00353 is dismissed.

2. The applicants must pay the first respondent's costs occasioned by the application under INT-HC-OTH-2024/00353 jointly and severally, the one paying the others to be absolved, including the costs of one instructing and two instructed legal practitioners, uncapped under rule 32(11).

The matter under INT-HC-OTH-2024/00353 is finalised and removed from the roll.

B DE JAGER

Judge

APPEARANCES

APPLICANTS:	J Hershensohn SC (with him R Lewies) Instructed by Cronjé Inc., Windhoek
RESPONDENTS:	A Corbett SC (with him S J Jacobs) Instructed by Koep & Partners, Windhoek