



REPORTABLE

CASE NO: SA 50/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

BANK OF NAMIBIA

First Appellant

ROMEO NEL N.O.

Second Appellant

and

CBI EXCHANGE NAMIBIA (PTY) LTD

First Respondent

BANK WINDHOEK LIMITED

Second Respondent

IMMANUEL MURWIRA

Third Respondent

Coram: DAMASEB DCJ, HOFF JA and LIEBENBERG AJA

Heard: 31 October 2022

Delivered: 23 December 2022

Summary: The appeal stems from a dispute between the parties relating to the first appellant's (Bank of Namibia) freezing of the first respondent's (CBI) bank account held with the second respondent (Bank Windhoek). BoN imposed the freeze on CBI's bank account based on its belief that CBI was acting in contravention of s 5 of the Banking Institutions Act 2 of 1998, which prohibits the conducting of banking business by unauthorised persons.

CBI approached the High Court on an urgent basis seeking to uplift the freeze on its bank account. Coleman J granted an order for the partial removal of the freeze pending the outcome of the review proceedings between the parties, and further ordered Bank Windhoek to release payments from CBI's account for the day-to-day running of its business, subject to the supervision of Bank Windhoek's compliance officer, in consultation with BoN's authorized officer.

The court's order caused a further dispute between the parties on the implementation of the terms of the order. CBI interpreted the order to mean it would decide what the necessary day-to-day expenses are, which expenses were apparent from the historical pattern of the bank account. Contrarily, BoN and Bank Windhoek understood the order to mean that CBI had to prove, with vouchers, what its necessary day-to-day expenses were and that BoN retains the ultimate discretion to decide whether a head of expenditure is a necessary day-to-day expense.

BoN and Bank Windhoek's reluctance to release the funds requested by CBI impelled CBI to approach the High Court on an urgent basis seeking, inter alia, an order directing BoN and Bank Windhoek to release funds from its bank account for the payment of its day-to-day expenses. In its judgment the court *a quo* (per Tommasi J) ordered the 'immediate' release of funds to CBI without including the safeguards imposed by Coleman J's order. BoN appeals the order of Tommasi J.

Held that, the court *a quo*'s order does not at all specify the day-to-day expenses in the very specific terms asked of her by CBI; neither does the learned judge say why she chose not to do so. The learned judge also made no order interdicting BoN and Romeo Nel from imposing conditions which CBI maintained before her as being the obstacle to the release of the funds.

Held that, if a part of a court's order is unclear but the reasoning in the body of the judgment clarifies it, it can be given effect to. But where the intent expressed in the body of the judgment is not reflected in the actual order it renders execution problematic. The reason for that is that an appeal lies against the substantive order made by the court and not against the reasons for judgment.

The appeal succeeds.

APPEAL JUDGMENT

DAMASEB DCJ (HOFF JA and LIEBENBERG AJA concurring):

Introduction

[1] The present appeal seeks to impugn an order of the High Court (Tommasi J) handed down on 7 July 2022. The matter came before Tommasi J on an urgent basis and as a sequel to an order made by Coleman J on 18 March 2022.

[2] The dispute between the parties relates to the first respondent's (CBI) quest to have its bank account held at the second respondent (Bank Windhoek) - hereafter 'the bank account' - unfrozen pending a review application launched by CBI to review and set aside a freeze imposed by the first appellant (BoN) on the bank account.

[3] BoN is Namibia's central bank and has supervisory responsibility over banks in Namibia in terms of the Bank of Namibia Act 1 of 2020 read with the Banking Institutions Act 2 of 1998 (the Act).

[4] On 4 March 2022 and purporting to act in terms of s 6(2)(g) of the Act, BoN froze the bank account. In terms of s 6(2)(f) of the Act, BoN is authorised 'if it has reason to believe that a person is conducting a banking business in contravention of s 5' of the Act to:

'by notice in writing delivered to a banking institution, instruct such banking institution [in this case Bank Windhoek] to summarily freeze any banking account or accounts of any person. . .with such banking institution, and to retain all moneys in any such banking account or accounts, pending the further instructions of the [BoN].'

[5] It is apparent from the terms of s 5 of the Act that the jurisdictional basis for the exercise of BoN's power to freeze a banking account is a contravention of s 5 of the Act which prohibits unauthorised persons to 'conduct banking business; receive, accept or take a deposit; by any means, including advertising or soliciting, procure or attempt to procure a deposit; pretend to be a banking institution' or 'use the expression "bank" or "banking institution", or any other expression, name, title or symbol indicating or calculated to create the impression that the person is conducting, or is authorised to conduct, business as a banking institution unless such a person is under [the Act] authorised to so conduct business as a banking institution'.¹

[6] In other words, BoN issued the freezing order on the bank account because it has 'reason to believe' that CBI was acting in contravention of s 5. This is a public power exercised by the central bank to protect the interests of the public.

Litigation history

[7] Aggrieved by the freezing of its account, CBI approached the High Court on an urgent basis on 18 March 2022 and obtained an order from Coleman J in the following terms, with costs:

'2. Pending the outcome of the dispute between the parties, [First respondent] must do everything necessary to partially remove the freeze in terms of section (6) (2)(f) of the Banking Institutions Act, of 2 of 1998, placed on the Applicant's

¹ Section 5(1)(a) – (e) of the Banking Institutions Act 2 of 1998.

account held with [third respondent] in order for [CBI] to meet its necessary day to day business expenses;

3. In pursuance of the partial removal of the freeze referred to in paragraph 2 above, 3rd Respondent is ordered to release payments from applicant's account necessary for the day to day running of its business, subject to the supervision of 3rd respondent's Compliance Officer and in consultation with the 1st Respondent's Authorized Officer'.

[8] Coleman J did not give reasons for his order. However, the following is common cause. After the freeze on the bank account, CBI launched an urgent review application to set aside the freeze. Coleman J declined to hear the review application on an urgent basis. The record shows that even before the parties addressed him concerning the review, the learned judge had made up his mind that he would not hear the review application but that he intended to grant some form of relief to CBI to be able to pay some expenses from the frozen account pending the determination of the review application.

[9] I make more detailed observations about what transpired before Coleman J because the order the learned judge gave was not that which CBI had sought but was in fact resisted by its counsel when mooted by the presiding judge.

[10] Coleman J had asked BoN's counsel if there would be any objection to the partial removal of the statutory freeze. Counsel for the appellants informed the court that there would be no objection, provided that supporting vouchers are provided by CBI for the necessary expenses and that payments be released in consultation with the BoN's compliance officer.

[11] The second appellant, Mr Romeo Nel, as the BoN's compliance officer at the material time, acted in his official capacity as the person authorised by the Board of the BoN for purposes of exercising powers pursuant to section 6(2) of the Act. The third respondent is Bank Windhoek's official who was directed by Coleman J to supervise the partial release of funds from the bank account in consultation with Mr Nel.

[12] An intractable dispute ensued between the parties on the implementation of Coleman J's order as they could not come to some *modus vivendi* regarding the 'partial' unfreezing of the bank account. CBI took the view that it would decide what the necessary expenses are – and that in any event such expenses were apparent from the historical expenditure pattern apparent from the bank account. Principally guided by the view taken on the matter by BoN's Mr Nel, Bank Windhoek's attitude was that CBI had to prove, with vouchers, what were the necessary day-to-day expenses.

[13] I will cite some examples of the correspondence exchanged between the parties to show the interpretation each placed on Coleman J's order. In a letter to Bank Windhoek after Coleman J's order Mr Nel stated the following:

'I welcome written representations from CBI as to why the freeze on their account should not persist pending the finalization of my investigation (which thus far prima facie demonstrate a contravention of section 5 of the Banking Institutions Act, 1998, by CBI)''

In respect of paragraph 3 of the Court Order, I noticed that CBI listed some of its expenses (for which no proof was attached) in paragraphs 40.1 to 40.11 of its founding affidavit. My preliminary assessments of the flow of monies into and from the bank account to which paragraph 3 of the Court Order pertains, does not reflect

payment of any of the expenses listed in paragraph 40.1 to 40.11 of the applicant's founding affidavit.

Be that as it may, per paragraph 3 of the Court Order, for purposes of my role in (sic) therein, I invite CBI, as soon as practically possible, to submit to me their monthly day to day business expenses, supported by vouchers (and in relation to the expenses that are historical in nature to be supported by a history of transactional payment thereof).'

[14] The trail of correspondence from 1 April 2022 to 24 May 2022 between Bank Windhoek and CBI (mainly through their lawyers) shows that Bank Windhoek persistently maintained that CBI had to provide proof that an expense to be authorised is a necessary day-to-day expense and had to provide supporting documents such as vouchers and contracts. For example, in a letter dated 1 April 2022, Bank Windhoek's legal practitioner from Fisher, Quarmby & Pfeifer stated:

'The following process will be followed by our client to give effect to the court order. Your client must provide or client with a list of payments to be made for the day-to-day business expenses, supported by proof of calculation of the amounts and proof that it is indeed a business expense necessary for the day-to-day running of the business. Once this information is received, our client's Compliance Officer will consult with the Authorised Officer from Bank of Namibia as envisaged by paragraph 3 of the court order and request authorization from the Bank of Namibia to partially remove the freeze over the account as required by paragraph 2 of the court order. Once the aforesaid consultation is completed and authorization for partial removal of the freeze order is received from the Bank of Namibia, the allowable payments will be released and processed accordingly.'

[15] This procedure was vehemently resisted by CBI. I will refer to a letter by CBI's legal practitioner (Africa Jantjies Legal Practitioners) which is typical of its interpretation of Coleman J's order. On 1 April 2022, CBI's legal practitioner replied to the letter of Fisher, Quarmby & Pfeifer which, in so far as it is relevant for the present purposes, states as follows:

'3. The proposed process is problematic, at least for the following reasons:

3.1 Your client does not need authorization from bank of Namibia through Romeo Nel "to partially remove the freeze". It follows that you need not request such authorization to partially unfreeze. The High Court of Namibia has already done that. Your attention is drawn to paragraph 2 of the court order.

3.2 Release of day-to-day business expenses is subject to only: (a) supervision by your client's compliance officer, and (b) in consultation with Romeo Nel.'

[16] CBI however proceeded to furnish to Bank Windhoek a list of expenses it considered as necessary expenses. Once Bank Windhoek received the same, it informed CBI that it had 'started with the process of evaluating them and will in due course confer with [BoN's authorised officer Mr Nel]. We will then communicate to you the outcome of these deliberations and how . . . approved payments will be processed'.

[17] CBI's reply was predictable. In part, it states:

'3. It appears from the content of your email that you seek to interpret the Court Order. . . . issued on 18 March 2022.

4. Two extremely disturbing features recorded in. . .your email. . .states that "you have started the process of evaluating the necessary day-to-day business expenses of CBI . . . and that you will in due course confer with the First respondent, and thereafter communicate the outcome of your deliberations and how approved payments will be processed".

5. We immediately draw your attention to paragraph 3 of the Court Order . . .

6. [N]where in the Court Order . . . does it direct that you must first evaluate the necessary day-to-day business expenses of CBI . . . and that you may in due

course confer with the First Respondent, and only thereafter communicate the outcome of your deliberations and how approved payments will be processed.

7. Further . . . the Court Order does not direct you to exercise any discretion to engage in an evaluation process, deliberate same and decide what payments to approve.'

[18] The result of the stalemate is that barring a Telecom account totaling N\$13 000 no other payments were authorised from the bank account.

[19] CBI saw the reluctance on the part of Bank Windhoek to partially unfreeze its account as an act of unlawful disobedience of Coleman J's order and approached the High Court on an urgent basis seeking the following substantive relief:

'2. An order directing the [Bank Windhoek and its compliance officer Murwira], and to the extent necessary [BoN and its authorised officer Romeo Nel N.O.] to release or cause to be released funds from the Applicant's bank account with [Bank Windhoek] for the payment by the Applicant of its of day-to-day expenses for the period March 2022 to May 2022 listed under Annexure "CBI-03" attached to the Founding Affidavit, within 2 (two) days of the Court Order.

3. An order interdicting and restraining the [BoN and Nel] from obstructing in any way the implementation of the Court Order dated 18 March 2022 and from imposing condition upon the release by Bank Windhoek of funds of the Applicant for payment of the necessary day-to-day expenses of CBI as directed by Court.'

4. That [Bank Windhoek and Murwira] are directed pending the finalization of the case instituted by the Applicant under case number HC-MD-CIV-ACT-OTH-2022/00097 to release to the Applicant such other monthly amounts constituting its necessary day-to-day expenses as they may be from time to time communicated to it by the Applicant and/or the Applicant's legal practitioner.'

[20] Although the correspondence that I previously cited is intended to give a flavor of the parties' differing interpretations of the order of 18 March 2022, it represents the

gist of their respective cases on affidavit when the matter came before Tommasi J. According to the BoN, the effect of Coleman J's order is that it retains the ultimate discretion to decide whether a head of expenditure is a necessary day-to-day expense. Its view is that CBI's request for payment must be supported by vouchers and

Mr Murwira will be authorised by Mr Nel to honour payments from the bank account.

[21] CBI's position is that its historical expenses as shown in the bank statements show what the necessary day-to-day business expenses constitute – and that going forward – it will inform Bank Windhoek's compliance officer what payments are to be made and that it is not open to the compliance officer (or indeed BoN's authorised officer) to decline payment once CBI has made a payment request.

[22] In its founding affidavit, CBI maintains that the dispute is between it and Bank Windhoek as regards the latter's obligation to release funds for CBI's day-to-day expenses. According to CBI, BoN and Bank Windhoek have, contrary to Coleman J's order, been frustrating and obstructing the partial release of funds through imposition of 'unlawful and impossible conditions' to the release of funds to meet its necessary day-to-day expenses resulting in it suffering 'operationally and financially'.

[23] It is alleged that BoN and Bank Windhoek refuse to release funds 'despite being repeatedly provided with requisite expense details' – despite, it is said, Coleman J having 'already considered and was aware of CBI's day-to-day expenses and having ordered payment thereof through a partial opening of CBI's bank account'.

[24] It is made clear in the founding affidavit what the purpose of the application is.

That is-

(a) To restrain the authorised officer and the compliance officer from obstructing the implementation of Coleman J's order;

(b) To restrain the authorised officer and the compliance officer from unlawfully imposing conditions for the release of funds by Bank Windhoek;

(c) An order directing Bank Windhoek to unconditionally release from the bank account 'the combined amount of N\$ 3, 313, 232.44' being the day-to-day expenses of CBI for the period March 22 – May 22; and

(d) Ordering Bank Windhoek to release to CBI such monthly amounts as day-to-day expenses as may be communicated to it by CBI.'

The High Court (Tommasi J)

[25] After hearing oral argument, Tommasi J gave an order on 7 July 2022. In relevant part the order states:

'2. The third and fourth respondents and to the extent necessary, first and second respondents must comply with the court order dated 18 March 2022 with immediate effect and release payments/funds from the applicant's bank account which is necessary for the day-to-day running of the applicant's business from date of the court order to date of this order.

3. The respondents, jointly and severally, the one paying the other to be absolved must pay the applicant's cost, such costs to include the cost of one instructing and one instructed Counsel.'

[26] The learned judge's departure point is that the case before her concerned whether or not BoN and Bank Windhoek were in compliance with Coleman J's order. According to the learned judge, that order 'has not been varied or rescinded, therefore the said order still stands and is binding on all the parties'.

[27] Tommasi J was thus alive to the fact that she was not being called upon to vary Coleman J's order. In fact, it was not open to her (even by interpretation) to vary that order.

[28] The court *a quo* concluded, based on the material placed before it, that:

'In this matter the simple and undisputed fact is that there has been no partial removal of the freeze to meet the applicants' necessary day-to-day business expenses. Further, there has also been no release of payments from applicants' account which would be necessary for the day-to-day running of its business.'

[29] Tommasi J attributed the partial non-release of the freeze on the bank account to the two banks' officials' interpretation of Coleman J's order. As the learned judge reasoned:

'[47] The phrase which is the root of the discord between the parties is: 'subject to the supervision of the 3rd respondents' compliance officer and in consultation with 1st respondents' Authorised Officer.'

[30] By reference to authority, Tommasi J proceeded to interpret the words 'in consultation with' and 'supervision' and concluded that 'It would appear from the use of this phrase that . . . [CBI] was to execute the payments under the watchful supervision of [Bank Windhoek] and in concurrence with the [BoN]'

[31] Tommasi J then held:

'[50] The court could easily have used other phrases like 'subject to authorisation' and 'subject to the discretion' if it was intended that fourth and second respondents were to have those powers. It is for this reason that I conclude that the respondents

have overstepped their mandate given by the court in their interpretation of the third prayer of the concerned order by assuming that the court granted them the discretion to decide which payments to make. The fourth respondent was merely given a supervisory function and such function is to be performed in consultation with the second respondent. The respondents must comply with the court order and release the payments from applicant's account necessary for the "day to day running" of its business, with immediate effect.

[51] The applicant in this application, sought an order for the payment of such other amounts constituting its necessary day-to-day expenses. The order forming the subject matter of dispute is quite clear. It indicates that the third respondent must release payment from applicant's account necessary for the day-to-day running of its business. The third respondent's bank statements of the applicant would give a history of what those payments are and as such would be a helpful guide for the third and fourth respondents to supervise such payments. The court in its order did not define what payments are necessary for the 'day-to-day running of the business' and neither will this court endeavour to do so.'

The appeal

[32] Only BoN appeals against the order of Tommasi J. It relies on four main grounds. The first ground complains that the court *a quo* misdirected itself in not properly applying the test for interpretation of a judgment – in particular by failing to take into account the full context within which Coleman J's order was made – which includes the fact that Coleman J did not define what are necessary day-to-day expenses and the fact that the roles carved out for BoN's and Bank Windhoek's officials were specifically included in the order at the request of BoN.

[33] The second complaint is that the court *a quo* erred in holding that BoN and Bank Windhoek overstepped their mandate as exemplified by the correspondence I have cited – when on a proper construction of the order and given that in not defining which payments are necessary for the day-to-day running of CBI's business,

Coleman J left it to Bank Windhoek's compliance officer in consultation with BoN's authorised officer to determine which expenses identified by CBI pass muster.

[34] The third ground is that the court erred in finding that the two banks failed to comply with the court order 'instead of finding that it was impossible' for them to comply with the court order unless CBI provides the necessary information and documents to satisfy BoN and Bank Windhoek that the expenses claimed are indeed necessary day- to-day expenses.

[35] The fourth ground alleges that in interpreting Coleman J's order Tommasi J misdirected herself by failing to determine by whom and how the necessary day-to-day expenses are to be determined when it was clear that 'someone needs to determine' that issue. It is further alleged that Tommasi J 'in fact varied [Coleman J's order] . . . by effectively removing the safeguards built into paragraph 3 of the court order of 18 March 2022'.

Submissions

[36] On behalf of BoN Mr Töttemeyer suggested that if CBI is aggrieved by the compliance officer's rejection of a payment request its recourse is to approach the High Court for review. The argument goes that on a proper interpretation of the order of 18 March 2022 payment of an expense from the frozen account must be supported by voucher and demonstrated to be a necessary expense.

[37] Mr Töttemeyer further argued that the authority cited by the *court a quo* makes it clear that 'in consultation with' implies that BoN has to approve the expenses to be made from the bank account and that it can only do so if CBI by voucher and source

documents proves to BoN's satisfaction that an expense is a necessary day-to-day business expense. Counsel submitted that the interpretation that Tommasi J gave to the role reserved for BoN in the order of 18 March 2022 amounts to an impermissible variation of Coleman J's order.

[38] Mr Namandje for CBI submitted that CBI's application before Tommasi J 'was not so much about the interpretation of the High Court order of 18 March 2022' but about 'certain acts on the part of the appellants and Bank Windhoek and Mr Murwira which frustrated and obstructed the implementation of [Coleman J's order], and attainment of its purpose, by unlawfully and improperly imposing inappropriate conditions on the terms of that Court Order'.

[39] It was made clear on behalf of CBI that 'the question of the interpretation of the earlier Court Order, at least paragraph 2 thereof, does not arise in this appeal' and that the issue of interpretation is being raised by the appellants 'as a ruse to avoid compliance with the terms of the earlier Court Order'.

[40] Counsel submitted that Bank Windhoek as the custodian of CBI's bank account 'could easily discern what regular expenses were paid from that account'.

[41] Mr Namandje for CBI submitted that the manifest purpose of Tommasi J's order was to authorise payment of the expenses listed in annexure CBI-03 to the founding affidavit that served before Tommasi J and that if BoN was dissatisfied with the amounts reflected in that annexure it 'behaved them to approach the Court below to seek a resolution of that issue, and not remain supine in their claim to be the final arbiters of that issue'.

[42] According to Mr Namandje, the order of 18 March 2022 directing Bank Windhoek to do everything to partially remove the freeze on the bank account was not made 'subject to any condition except that [the partial removal] was to remain in force pending the outcome of the dispute between the parties in the subsequent review proceedings'.

[43] Mr Namandje submitted that 'Bank of Namibia and Mr Nel are reading too much into the words "supervision" and "in consultation"' and that 'supervision and in consultation in context mean no more than the usual banking requirements and procedures when faced with instructions to release payments to defray a customer's expenses'.

Issue for decision

[44] CBI's core complaint is that the BoN and Bank Windhoek have since the order of 18 March 2022 not complied with the court's direction to partially unfreeze the bank account for it to pay the necessary day-to-day expenses as exemplified by historical expenses or as advised to Bank Windhoek from time to time.

[45] The issue that arises is whether the order by Coleman J and that by Tommasi J support CBI's contention that the partial unfreezing of the bank account meant that Bank Windhoek is required to authorise payments on behalf of CBI on the strength of historical expenses – and going forward on the mere say-so of CBI as to what are day-to-day expenses.

[46] The first dilemma is that Coleman J gave no written reasons for the order he made from which it could be discerned what view he formed as to what are

necessary day-to-day expenses. Similarly, Tommasi J dealt with the matter in broad strokes and was non-committal on what were necessary day-to-day expenses. The learned judge thought it was unnecessary to do so.

[47] This appeal turns on whether CBI had made out the case for the relief it sought. That issue is bound up with BoN's core complaint: that Tommasi J impermissibly varied Coleman J's order – by removing the safeguards inserted into the order by Coleman J as regards the role of BoN and Bank Windhoek in the release of funds from an account on which the BoN had imposed a statutory freeze.

Analysis

[48] A reading of paragraphs 50 and 51 of Tommasi J's cyclostyled judgment shows that the court *a quo* (a) considered that CBI's bank statements preceding the freeze should be the basis for determining what are its necessary day-to-day expenses and (b) disapproved BoN's and Bank Windhoek's view that Coleman J's order 'granted them the discretion to decide which payment to make'.

[49] Yet – and in the face of specific orders sought by CBI in those two respects – the court *a quo* failed to give orders (a) directing payment based on CBI's previous bank statements or (b) to interdict what it considered to be BoN's and Bank Windhoek's impermissible conduct. Not only that, the court *a quo* (both in its reasons and the orders made) expressed no view on the prayer that the future release of funds should be according to what CBI would advise Bank Windhoek.

[50] It is trite that the 'primary purpose of a court order is to authoritatively determine the rights, duties and obligations of parties. . .in respect of the issues placed before it'.² As the South African Constitutional Court put it in *Eke v Parsons*:³

'A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance. . .If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies, the discretion to comply or disregard it.'

[51] Tommasi J intended, as I understand it, to give effect to Coleman J's order. CBI had approached her to do just that as I also understand their case to be on appeal. It is curious that if that is how Tommasi J understood CBI's case that in her order she did not make that clear so as to remove any doubt as to what she intended.

[52] In the notice of motion that served before Tommasi J, CBI sought orders that could have put the matter beyond doubt in support of the propositions made on appeal. In prayer 2 of the notice of motion CBI directed the court's attention to what it considered to be the day-to-day expenses, being, it said, those expenses 'listed under Annexure CBI-03 attached to the Founding Affidavit. . . .'

[53] CBI additionally asked the court for an interdict against BoN and its authorised official, Romeo Nel, 'from obstructing in any way the implementation of the Court

² L Malaba Chief Justice of Zimbabwe 'Court Orders' (Judicial Service Commission) at p 6.

³ *Eke v Parsons* 2016 (3) SA 37 (CC) paras 73-74.

Order dated 18 March 2022 and from imposing condition (*sic*) upon the release by Bank Windhoek of funds to the Applicant for payment of the necessary day-to-day expenses of CBI as directed by court’.

[54] CBI also sought an order that Bank Windhoek and Mr Murwira be directed ‘to release to [CBI] such other monthly amounts [in context, meaning in addition to those listed in CBI-03] constituting its necessary day-to-day expenses as they may be from time to time communicated to it by the Applicant and or/or the Applicant’s legal practitioner’.

[55] Tommasi J’s order does not at all specify the day-to-day expenses in the very specific terms asked of her by CBI; neither does the learned judge say why she chose not to do so. The learned judge also made no order interdicting BoN and Mr Nel from imposing conditions which CBI maintained before her as being the obstacle to the release of the funds.

[56] If a part of a court’s order is unclear but the reasoning in the body of the judgment clarifies it, it can be given effect to.⁴ But where the intent expressed in the body of the judgment is not reflected in the actual order it renders execution problematic. The reason for that is that an appeal lies against the substantive order made by the court and not against the reasons for judgment.⁵

[57] As Nicholas AJA wrote on behalf of a unanimous court in *Administrator, Cape, and Another v Ntshwaqela and Others*⁶:

⁴ *Communications Regulatory Authority of Namibia (CRAN) v Mobile Telecommunications Company of Namibia (MTC)* (SA 37/2021) [2021] NASC 45 (4 November 2021) para 21.

⁵ *Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

⁶ *Administrator, Cape, & Another v Ntshwaqela & others* 1990 (1) SA 705 at 716A-C.

'[T]he order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the whole world, may know it. It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive and cannot be restricted or extended by anything else stated in the judgment.'

[58] The above dictum lays bare the problem facing CBI in relation to the most important part of the relief it sought from Tommasi J. As I demonstrated, CBI specifically sought payment of a quantified amount as reflected in its annexure CB-03. It made an unequivocal averment that the amounts reflected in that annexure represent its necessary day-to-day expenses for a defined period. That was however contested by the BoN, yet in her reasons Tommasi J did not resolve the dispute. Most importantly, the actual order is silent on the issue.

[59] On appeal CBI insists that Tommasi J's order intended that payment be made on the strength of the annexure. How could that be? It is equally plausible that the fact that the executive order makes no mention of it is because the learned judge was not satisfied that all items reflected therein constitute necessary day-to-day expenses.

[60] The same problem of uncertainty applies to future payments. CBI specifically asked for an order that future payments be made based on what CBI will identify as necessary day-to-day expenses. Again that was contested but the court did not resolve the dispute. The court *a quo* instead deferred (at para 51) the issue for decision suggesting that CBI's historical expenditure as reflected in its bank statements 'would be a helpful guide for . . . Bank Windhoek and Murwira]. That is a

far cry from CBI's contention that it alone will determine what the necessary day-to-day expenses are.

[61] CBI does not cross-appeal Tommasi J's order to the extent that it omits very important aspects of the relief that it sought from the learned judge. Yet CBI argued on appeal that it is entitled to payment of those heads of expense listed in CBI-03 and those that it will communicate to Bank Windhoek from time to time. Tommasi J's order does not support that claim. To sustain that claim, CBI ought to have either asked Tommasi J to clarify her order or, by cross-appeal, to ask this court to correct the order to include that which it had sought from Tommasi J but was not granted.

[62] BoN and Romeo Nel appeal against Tommasi J's order on a very specific aspect. They complain that the learned judge erred in omitting from her order the safeguards imposed by Coleman J as a condition for the 'partial release' of CBI's necessary day-to-day expenses.

[63] Tommasi J's remarks in para 51 exclude BoN's role inserted by Coleman J as it refers to only Bank Windhoek and Murwira. Besides, the learned judge's other remarks as regards to role carved out for BoN and Bank Windhoek by Coleman J create more confusion than it assists the parties. As she put it:

'The fourth respondent was merely given a supervisory function and such function is to be performed in consultation with the second respondent.'

[64] This does not sit comfortably with the dicta cited by the learned judge herself at paras 48 and 49 of her judgment as concerns the concepts 'supervision' and 'in consultation with'.

[65] In the learned judge's own words:

[48] In *Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another* the Supreme Court, quoting with approval the sentiments stated in *Van Rooyen and Others v The State and Others* stated:

“The meaning of the phrases in consultation with and after consultation with are now well established. In consultation with requires the concurrence of the other functionary (or person) and if a body of persons, that concurrence must be expressed in accordance with its own decision-making procedures.

In the former case the person making the decision cannot do so without the concurrence of the other functionary (or person). In the latter case he or she can.”

[49] The word “supervision” is a verb and is defined in the Oxford English Dictionary as: “observe and direct the execution of (a task or activity) or the work of (a person)”. The Cambridge Dictionary defines it as: “the act of watching a person or activity and making certain that everything is done correctly, safely, etc.” It would appear from the use of this phrase that the applicant was to execute the payments under the watchful supervision of the fourth respondent and in concurrence with the respondent.’ (My underlining).

[66] Purporting as she did to give effect to Coleman J's order, Tommasi J's order in para 2 makes no mention whatsoever of the safeguards imposed by Coleman J for the release of the day-to-day expenses, that is: ‘subject to the supervision of [BoN's] compliance officer and in consultation with . . . [Bank Windhoek's] Authorised officer’.

[67] It is clear from the 18 March 2022 order that Coleman J envisaged a measure of control on CBI's ability to access the funds at Bank Windhoek. The dicta cited by Tommasi J support that view. I therefore do not find merit in Mr Namandje's

submission on appeal on behalf of CBI that Coleman J intended it to be the sole determinant of what are necessary day-to-day expenses.

[68] I will return to the appeal after I deal with the problems created by Coleman J's order.

Coleman J's order

[69] Coleman J's order is not contested on the present appeal and we have not been asked by either party to consider its correctness in law. It is necessary though that for the record and as a guidance to the parties for the future conduct of their inevitable disputes, I express my concern about the manner in which that order came about. I do so based on the public record that has been placed before us on appeal. Volume 3 of the appeal record contains the proceedings that took place before Coleman J.

[70] When CBI's urgent review application was called before Coleman J, CBI was represented by Mr Diedericks while Mr Muhongo appeared for BoN. Mr Muhongo placed on record that he was holding a watching brief. It is apparent from the record that just before the hearing BoN had filed an affidavit in essence explaining that it had withdrawn the initial freeze on the bank account because it accepted it was irregular and that it had imposed a new freeze on the account and invited CBI to make representations.

[71] Mr Diedericks:

'[T]he point I make . . . is that there is no longer a dispute on the facts with respect to what the Applicant sought. In...the absence of dispute, the Bank move to . . . directed the issue complained about in the application. So that dispute disappeared with A1.

Court: The dispute about the freeze.

Mr Diedericks: Yes My Lord. The unlawfulness. The review that was sought. . .all leading up to the or the resolution the appointment of officer, the direction to the bank and the freeze, all that disappeared and the bank, when I say bank My Lord Bank of Namibia withdraws that freeze and say so under oath, it says, if may take Your Lordship to (intervention).'

[72] Further down the record (and after Mr Muhongo confirmed much of what Mr Diedericks placed on record):

'Mr Diedericks: ...in this Affidavit the Respondent says... we have remedied the issue that you are complaining about but simultaneously uncorrected papers a new freezing of the account. That is what have been sought and for that reason My Lord but I say A1 confirms that there is no longer a dispute that the relief was effectively considered (sic) [read conceded] and that the bank proceeded under A2 to freeze the account again.

Court: Okay. So what you are saying because I did not understand that letter to actually to be a complete but you are saying is that Bank of Namibia back down.

Mr Diedericks: Yes.

Court: On the freeze of your client's account.

Mr Diedericks: Correct My Lord.

...

Court: . . . but for some reason Bank Windhoek insisted to persist with the freeze, is that what you are saying?

Mr Diedericks: No. Bank Windhoek in respect of the application says will abide and that documents uploaded on the E-justice. Bank of Namibia says we have considered your application. We are not opposing your application. We have if they can, the authorized officer unfreeze your account.

Court: Okay.

...

Mr Muhongo: On the Applicant's complaint Your Lordship . . . the Applicants' complaint is good. Your Lordship would know from Annexures A and B their

complaint is good. It would be imprudent of us to have persisted in our position to that, in that effect.

. . .

Mr Muhongo then addressed the new freeze and placed on record that 'Your Lordship would note that in the letter of 16 March as well with the new freezing having been placed on the account. There is an invitation to the applicant'.

Court: Yes

Mr Muhongo: To come and make representations in the course of that investigation whenever they might want to, as to why the freeze should then be uplifted.

Court: Mr Diedericks either you take my order or we are going to sit here the whole day. . . what I understood was that this second 16 March as Mr Muhongo says was a second imposition of a freeze. Now once again I am not going to get into the review.'

[73] Nothing Mr Diedericks or Mr Muhongo said would deter the court from dealing with a review both parties tried to impress on it had become moot. Mr Diedericks tried again:

'Mr Diedericks: I may ask that Your Lordship considers my submissions in the light of no opposition to the application.'

[74] When Coleman J insisted that 'the appropriate order is the one that I suggested that pending the outcome of the dispute between the parties I order Bank Windhoek to unfreeze the Applicant's account to the extent of necessary and essential expenses', Mr Diedericks retorted:

'We cannot My Lord because . . . that is transcended, so the authorisation were corrected in the subsequent freeze, so we cannot pursue the review because the papers were corrected to do a certain freeze. So . . . whatever the bank did and we complained about . . . has been deleted that and started afresh on other authorisations . . .'

[75] Mr Diedericks continued:

'Your Lordship in the context of the unopposed relief, what will happen to the cost of the application because it significant (sic) disappeared?'

Court: No. I would order that the cost at the end of the day is cost in the course.

Mr Diedericks: In the course of the review.

Court: In the course of the review you would bring for, to consolidate the dispute.

Mr Diedericks: But that will be in separate proceedings Your Lordship ...in subsequent review, because a subsequent review would be focussed towards these new authorisations it would have nothing to do with the present application.'

[76] It is apparent that however hard Mr Diedericks tried to impress upon the learned judge that the review application had effectively become moot and that all the court was asked to do was to set aside the initial freeze because its unlawfulness was conceded, the court would have none of it.

[77] The learned judge then proceeded to grant the order which has since led to the costly litigation that has led to the present appeal.

[78] The issue before Coleman J was simply to set aside the initial freeze and in that way dispose of the urgent application then pending before him but the learned judge chose to keep alive what on behalf of CBI he was told had become a moot review.

[79] Why CBI did not simply seek to have Coleman J's order rescinded or to appeal or seek a review of it to this court is not clear to me. A litigant has an obligation to adopt a course of action that brings an immediate end to litigation and to avoid unnecessary costs where that is possible.⁷

⁷ Compare: *Tsamaseb v Tsamaseb* 2007 (1) NR 117 (HC).

[80] This court has on numerous occasions in the past cautioned courts of first instance to confine their orders to what parties place before them and not to go on a frolic of their own. I suppose we should not tire in repeating that message as often as it is necessary.

[81] Since the order of 18 March 2022 is not the subject of a live controversy before us we are not at liberty to interfere with it. That would be going on a frolic of my own!

Disposal

[82] For the purpose of the present appeal, the sole question that confronts us is whether Tommasi J erred by ordering the 'immediate' release of funds to CBI without including the safeguards imposed by Coleman J for such release.

[83] For the reasons that I have already set out, I take the view that Tommasi J erred in the manner alleged in the appellants' grounds of appeal. The appeal should therefore succeed with costs. For the avoidance of doubt, the effect of this court's order is to preserve Coleman J's order.

[84] I prefer not to express any view on the correctness of BoN's assertion that the role contemplated for it in Coleman J's order is that it alone must decide what are necessary day-to-day expenses and that CBI is required to submit vouchers and proof – such as contracts and source documents - for the release of the funds. Should the impasse persist, that may very well become an issue for debate in the High Court before this court's intervention is sought.

[85] Order:

1. The appeal succeeds with costs, including those occasioned by the employment of one instructing and two instructed legal practitioners.
2. The order of the High Court (Tommasi J) is set aside and replaced by the following:

‘The application is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioners.’

DAMASEB DCJ

HOFF JA

LIEBENBERG AJA

APPEARANCES

APPELLANTS: Mr R Töttemeyer with him N. Bassingthwaighte
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