REPORTABLE

CASE NO: SA 73/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MENZIES AVIATION (NAMIBIA) PROPRIETARY LIMITED	**Appellant**

and

NAMIBIA AIRPORTS COMPANY LIMITED	**First Respondent**
PARAGON INVESTMENT HOLDINGS (PTY) LTD JV ETHIOPIAN AIRLINES	**Second Respondent**
SKY AVIATION SERVICES (PTY) LTD	**Third Respondent**
NAMIBIA FLIGHT SUPPORT CC JV EQUITY AVIATION	**Fourth Respondent**
KINGS GROUND AIRPORT SERVICES (PTY) LTD	**Fifth Respondent**
MENELL INVESTMENT CC JV NAS	**Sixth Respondent**
CENTRAL PROCUREMENT BOARD OF NAMIBIA	**Seventh Respondent**
CHAIRPERSON OF THE REVIEW PANEL	**Eighth Respondent**
MINISTER OF FINANCE	**Ninth Respondent**
ATTORNEY-GENERAL	**Tenth Respondent**

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: **8 April 2024**

Delivered: **14 May 2024**

Summary: This is an appeal against the dismissal of a temporary interdict pending the finalisation of a review application. In August 2021, the Namibia Airports Company Limited (NAC) invited bids for the ground handling services at the Hosea Kutako International Airport (HKIA). Menzies Aviation (Namibia) (Pty) Ltd (Menzies), Paragon Investment Holdings (Pty) Ltd JV Ethiopian Airlines (Paragon) and other entities tendered for the ground handling services and on 13 December 2021, the bid was awarded to Paragon. Menzies appealed against this award to the Review Panel, which appeal was dismissed – igniting a sustained litigious process between the parties since 2022. In the High Court, Menzies failed to foil an eviction application by the NAC and its counter-application interdicting the NAC from handing over the premises for ground handling services to Paragon. In the eviction judgment in favour of the NAC the court *a quo* found that the ground handling agreement between the NAC and Menzies would come to an end on 30 June 2022; that Menzies was obliged to, at that date, cease its services and vacate HKIA failing which the NAC would be entitled to call on the Deputy Sheriff to evict Menzies from the HKIA. The court struck from the roll Menzies' interim interdict on the basis of the non-joinder of the Chairperson of the Review Panel. Menzies appealed against the orders in favour of the NAC (the eviction judgment) and launched a new application for the interdictory relief pending the finalisation of the review application. The High Court dismissed Menzies' application for a temporary interdict on 23 May 2023. Likewise this Court also dismissed Menzies' appeal against the eviction judgment on 9 June 2023. This appeal is against the dismissal of the application for interdictory relief pending the finalisation of the review application.

On appeal, this Court had to determine the NAC's condonation application for its non-compliance with rule 7(4) of the Rules of Court for the late filing of its notice to oppose an appeal and for the late filling of its 'Special Power of Attorney to oppose an appeal'. Menzies opposed this application. The court also had to determine the following issues: whether Menzies unduly delayed instituting its application for interdictory relief pending the finalisation of the review application on 21 October 2022; whether a new ground handling services agreement came into place between

the NAC and Menzies and finally, whether Menzies had a *prima facie* right to remain the ground handler pending the review application.

Held that, the object of a power of attorney is to prevent a person named as a party in litigation from repudiating such litigation because those who acted for him were not authorised to do so. Courts lean towards condoning the late filing of powers of attorneys rather than to punish a party who wishes to proceed with the litigation where prejudice to the other parties to the litigation is absent.

Held that, this Court is satisfied that the NAC board resolution of 30 June 2022 clothed Mr /Uirab with the authority to appoint the legal practitioners acting for the NAC. The court thus grants the condonation application.

Held that, the test for undue delay for interim interdicts is not the same as the test for undue delay in the institution of review proceedings. The delay in respect of interim interdicts is measured against the promptitude with which the ultimate final relief is pursued and the focus is not solely on the timeline in respect of the interim relief.

Held that, the two cases referred to by the court *a quo* (ie *Juta & Co Ltd v Legal & Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C) and *Jantjies v Jantjies & others* 2001 NR 26 (HC)) were not of relevance in the present matter where the main application had already been instituted by the time the application for interim relief was instituted.

Held that, considering the context of this matter, a seamless take over from Menzies could be effected at any time. There was thus no practical impediment standing in the way of granting interlocutory relief provided a case for such relief had been made out. It follows that, in the context of interim interdicts, there was no undue delay in bringing the application and the court *a quo*'s finding in this regard cannot be sustained.

Held that, for Menzies to show, *prima facie*, that irregularities occurred in the award of the bid to Paragon does not, in itself, entitle it to the relief sought. Menzies must go further, and establish *prima facie,* that it would have been awarded the bid had the process to determine which bidder should be awarded the contract, been conducted fairly and free of the alleged irregularities. This Menzies was unable to do.

It thus follows that the application was correctly refused.

The appeal is dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and HOFF JA concurring):

Introduction

[1] During August 2021 the Namibia Airports Company (NAC) invited bids for the ground handling services at Hosea Kutako International Airport (HKIA). A number of bidders tendered for the services and on 13 December 2021 the bid was awarded to Paragon Investment Holdings (Pty) Ltd JV Ethiopian Airlines (Paragon). Menzies Aviation (Namibia) (Pty) Ltd (Menzies) appealed against this award to the Review Panel on 15 December 2021 but that appeal was dismissed by the Review Panel on 1 February 2022. In the meantime NAC on 1 January 2022 extended the agreement for ground handling services by Menzies to 30 June 2022 which extension also provided for written termination upon a month's notice.

[2] When the NAC sought to give one month's notice to Menzies to terminate the ground handling services agreement on 31 March 2022, Menzies informed the NAC

that ‘Paragon will not be permitted to take over any ground handling operations and that Menzies will continue to provide the services until further notice’. Shortly after this response by Menzies and in April 2022, they launched a review application to set aside the award of the bid to Paragon. (The review application). This review is still pending in the High Court. On 22 April 2022 the NAC informed Menzies that they would adhere to the ground handling agreement and the termination date of 30 June 2022. In an exchange of letters Menzies sought an extension of the ground handling agreement pending the determination of the review application. However, the NAC requested an undertaking from Menzies that they would vacate HKIA on 30 June 2022. When such undertaking was not forthcoming the NAC informed Menzies on 20 May 2022 that their stance left the NAC with no option, but to approach the High Court for urgent relief.

[3] The NAC followed up on their statement and approached the High Court for an order declaring that their ground handling agreement with Menzies would terminate on 30 June 2022 and directing Menzies to act accordingly. Menzies opposed this application based on an alleged tacit relocation of the ground handling agreement and in addition also instituted a counter-application to set aside the award of the bid to Paragon alternatively, interdicting the NAC from handing over the premises for ground handling services to Paragon pending the review application instituted by Menzies. Menzies also raised a number of collateral challenges relating to the bidding process in terms of which Paragon was identified as the preferred bidder.

[4] The High Court on 29 June 2022 granted the relief sought by NAC and declared that the ground handling agreement between the NAC and Menzies would come to an end on 30 June 2022, that Menzies was obliged to, at that date, cease its services and vacate HKIA failing which the NAC would be entitled to call on the Deputy Sheriff to evict Menzies from the HKIA. The interim interdict sought by Menzies was struck from the roll on the basis of the non-joinder of the Chairperson of the Review Panel. (The eviction judgment).

[5] Menzies' reaction to the eviction judgment was two-fold. It appealed to this Court against the orders in favour of the NAC. As the interdictory relief was struck from the roll and not dismissed on the merits they launched a new application for interdictory relief pending the finalisation of the review application on 21 October 2022.

[6] On 23 May 2023, the application for a temporary interdict was dismissed and on 9 June 2023 the appeal against the eviction judgment in favour of the NAC was likewise dismissed. The current appeal, with leave of the court *a quo*, is directed at the dismissal of the temporary interdict pending the finalisation of the review application.

Proceedings in the court *a quo*

[7] The application by Menzies in the court *a quo* for a temporary interdict pending the finalisation of the review application in the alternative also relied on the alleged further agreement between Menzies and the NAC in terms whereof the former

averred it could continue to occupy HKIA to render the ground handling services. This application filed by the applicant sought the following orders:

‘1. Interdicting the first respondent from;

1.1 implementing the purported award, or any contract entered into between

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

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

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

[8] In respect of the relief sought in para 1.1 of the order, it should be noted that a contract following upon the award of the tender to Paragon was concluded between Paragon and the NAC on 9 February 2022 and as pointed out above the appeal in the Supreme Court referred to has been finalised. At the time the *pendente lite* proceedings were heard the contract had not been implemented nor had the appeal been finalised.

[9] In respect of the relief sought in para 1.2 of the order, the 12 months' notice period is sourced in s 32(1)*(a)* of the Rents Ordinance 13 of 1977, which requires 12 months' notice in respect of business premises. As far as the reference to an order to be obtained by the NAC to set aside the alleged appointment of Menzies by way of the notice dated 30 June 2022 is concerned, this seems to be based on the principle that such appointment is valid until it is set aside.

[10] Rakow J dismissed the application essentially on the ground that there was an undue delay in the bringing of the *pendente lite* application. She also in passing stated that the probabilities did not establish the new agreement Menzies relied upon.

Condonation application

[11] In terms of rule 7(4) of the Rules of this Court, a respondent intending to oppose an appeal must within 21 days (or such longer period as may be allowed on good cause shown) file a notice to oppose. Such respondent must also, within 21 days of the filing of the notice to oppose, file a power of attorney authorising the legal practitioner involved to act on such respondent's behalf.

[12] The NAC did not adhere to the deadlines and a ‘Special Power of Attorney to oppose an appeal’ and a notice to oppose were filed late. A condonation application was brought to condone these non-compliances with the rules.

[13] Menzies opposed only the condonation in respect of the late filing of the power of attorney. The legal practitioner on behalf of the NAC explained that these omissions occurred due to an oversight in his office caused by a flurry of litigation at the time between Menzies, the NAC and Paragon with reference to specific separate cases being litigated at the time between these parties. Indeed, seeing the number of approaches by Menzies to the courts in respect of its dispute with the NAC and Paragon reminds one of the statement in *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd*[1] by Van Wyk J, that ‘There is such a thing as the tyranny of litigation . . .’. From this perspective coupled with the fact that the appeal was not delayed and could be argued in full with heads of argument filed on behalf of all the parties and hence no party could be prejudiced by the non-compliance with the said rules, a case for condonation was made out subject to the proviso that the NAC‘s legal practitioner was authorised to act on its behalf.

[14] Menzies took issue with the document filed purporting to be a power of attorney. Per letter dated 18 March 2024, the NAC’s legal practitioners advised Menzies’ legal practitioners that the notice to oppose the appeal had been filed on 14 March 2024 and that the power of attorney would be filed on 18 March 2024 (ie the

[1] *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C).

same date as the letter). A power of attorney was indeed filed on 18 March 2024. Per letter dated 19 March 2024, Menzies' legal practitioner stated that it is 'not just a matter of filing a power of attorney. Rather, it's an issue of a Board Resolution, supporting a power of attorney'.

[15] A special power of attorney to oppose the appeal was signed by Mr Gerson Adolf /Uirab in his capacity as Chief Executive Officer of the NAC which on the face of it authorised the legal practitioners to act on behalf of the NAC in the appeal. Where Mr /Uirab's power, to authorise the opposition and the appointment of the legal practitioners mentioned in the power of attorney, comes from, is not evident from the power of attorney at all. No board resolution granting him the authority to sign the power of attorney was attached to the power of attorney or the application for condonation.

[16] As correctly pointed out on behalf of Menzies, the NAC is deemed to be a public company in terms of its establishing Act[2] and Mr /Uirab is not a director of the NAC, but Chief Executive Officer (CEO) appointed by the board of the NAC on terms and conditions determined by the board. The establishing Act does provide for a written delegation from the board of its powers to any person or the incumbent of a designated position in the company. No resolution of the board either to specifically authorise Mr /Uirab to oppose the appeal nor a delegation to him or the office of the CEO accompanies the condonation application.

[2] Airports Company Act 25 of 1998.

[17] The object of a power of attorney is to prevent a person named as a party in litigation from repudiating such litigation because those who acted for him were not authorised to do so.[3] Thus, absent prejudice to the other parties to the litigation, courts lean towards granting late filing of powers of attorneys rather than to punish a party who wishes to proceed with the litigation. Normally the failure to file a power of attorney or a valid one is an omission, the cause of which, usually lies with the legal practitioner and not with the client. Thus in *Rally for Democracy* where the fault lied solely with the legal practitioners, condonation was granted. For further examples with regard to the general approach by courts to grant condonation where the strict adherence to the filing of the power of attorney requirements were not adhered to I refer to the following matters. A court authorised an attorney to enter an appearance to defend based on the letter from the client provided a proper power of attorney was filed prior to the commencement of the trial,[4] and were a power of attorney executed in Germany was not duly authenticated in terms of the rules, the issuing of a summons was authorised pending the filing of a duly authenticated power of attorney within six weeks.[5] In a similar case the court ordered that the power of attorney be filed in due course.[6] Where time was of the essence the power of attorney for the issuing of a summons was authorised pending its immediate filing on receipt thereof.[7] Where a summons was issued without a power of attorney to avoid the claim becoming prescribed, the court condoned the late filling of the power of attorney.[8] In

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[3] *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 83.
[4] *Butchins v Butchins* 1946 OPD 829 and *Perry v Perry* 1922 CPD 231.
[5] *Stehling & Co v Weinberg Bros* 1930 CPD 15.
[6] *Jungheinrich & Co v Brauns Ltd* 1927 EDL 169.
[7] *Ex Parte Wepener* 1918 23 GWLD.
[8] *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) AT 594H-595B.

short, where the evidence suggests the legal practitioner does have authority, such as in the form of a letter from the client, the court is loath to prevent the party from taking legal steps because the formality of the filing a formal power of attorney has not yet occurred.[9]

[18] From this Court's perspective, a power of attorney is required so as to avoid disputes as to the authority of a legal practitioner appearing for a party. The most cost efficient and practical manner to do this is to file a proper power of attorney. By now the contents of such powers of attorney are settled and it should be a simple matter for legal practitioners to create such powers of attorney by using a standard template and to tweak it to fit the circumstances of the particular appeal. Furthermore, there should be no need to remind legal practitioners that where authority is obtained from a legal entity the source of the authority must be clear eg for a company there should be a board resolution and for a partnership there should likewise be some decision by the particular partners.

[19] A further reason for the requirement of a power of attorney is to avoid this Court from having to determine the authority of the lawyer appearing for the party with reference to the affidavits filed in a specific appeal as a court of first instance. If powers of attorneys are filed timeously any technical issue with regard thereto can be addressed prior to the appeal and hopefully resolved.

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[9] See footnote 4 above.

[20] Counsel for applicant with reference to the record submitted that the authority of Mr /Uirab had been established and suggested the board resolution was thus not needed. This Court informed counsel for NAC that he would be entitled to provide this Court with a board resolution authorising Mr /Uirab to appoint legal practitioners acting for them or he could simply stand by his submissions, but if he chose the latter option, NAC would run the risk that the point of lack of authority raised on behalf of Menzies in respect of the NAC's legal practitioners might succeed. After the tea break he handed up a resolution of the board of NAC taken on 30 June 2022 authorising the Chief Executive Officer of the NAC to on its behalf 'oppose all . . . appeals . . .'.

[21] As far as I am concerned the board resolution of 30 June 2022 addressed the authority. I am however of the view that the raising of the authority point was reasonable in the circumstances and hence the condonation application was not unreasonably opposed and accordingly that NAC will have to pay the costs of the condonation application. I shall also further when I make the final costs order in this matter deal with the time unnecessarily spent on this issue when the NAC was forewarned about it and despite being in possession of a perfectly valid board resolution, this was not timeously disclosed which could have avoided the time spent on this issue at the hearing of the appeal.

[22] In the result, the condonation application will be granted. I shall now deal with the merits of the appeal.

<u>Undue delay</u>

[23] It is important to note that the test for undue delay when it comes to temporary interdicts is not the same as the test for undue delay when it comes to the institution of review proceedings. Where one is dealing with undue delay in respect of interim interdicts such delay is measured against the promptitude with which the ultimate final relief is pursued and the focus is not solely on the timeline in respect of the interim relief.

[24] Thus in *Juta & Co Ltd* an interdict was granted *pendente lite* and when the envisaged action was not instituted some five months later, the rule was discharged. In *Jantjies v Jantjies & others*[10] an urgent interdict *pendente lite* the institution of proceedings to set aside a writ issued to recover arrear maintenance was set aside because on the return date it appeared that no proceedings had been instituted to set aside the writ. In other words, the interim interdicts were set aside, not because there was an undue delay in instituting them but because there was an undue delay in instituting the main relief which was suspended while the temporary interdicts were in place. These two cases referred to by the High Court were thus not of relevance in the present matter where the main application had already been instituted by the time the application for interim relief was instituted. There was thus no question of the main relief being unduly delayed while the protection of an interim interdict was in place. That this is the concern that the courts seek to address is also evident from cases such as *Sandell & others v Jacobs & another*[11] and *Chopra v Avalon Cinemas*

[10] *Jantjies v Jantjies & others* 2001 NR 26 (HC).
[11] *Sandell & others v Jacobs & another* 1970 (4) SA 630 (SWA).

SA (Pty) Ltd[12] where the courts, instead of discharging the *rules nisi*'s extended them with directions as to the expeditious completion of the main relief.

[25] The other cases relied upon by the court *a quo* all relate to review matters where the point is made that the failure to obtain an interim interdict can lead to refusal to set an award aside. This follows from the fact that review is a discretionary remedy and circumstances may arise where it would not be equitable to set the decision sought to be reviewed aside. In *Namibia Airports Co Ltd v Fire Tech Systems CC & another*[13] an interim interdict was not obtained and the contract under attack had been fully performed by the time the review was heard and the court held that in those circumstances it could not set it aside. Similarly in *Chico/Octagon Joint Venture v Roads Authority & others*[14] this Court, in its discretion refused to set a road construction agreement aside where it had been substantially completed by the time the matter was heard. The point is that the omission to obtain temporary interdicts in such matters may lead to the courts not setting aside decisions sought to be reviewed where such decisions have been substantially implemented.

[26] There is no timeline in respect of when interim interdicts are to be instituted. Firstly, they must not be used as a mechanism to delay a decision on the real issue between the parties as is evident from *Juta & Co Ltd* and *Jantjies*. Secondly, and in respect of review applications, they must be sought timeously in the sense that it would still be practical and feasible to, in essence, stay the implementation or further

[12] C*hopra v Avalon Cinemas SA (Pty) Ltd & another* 1974 (1) SA 469 (D).
[13] *Namibia Airports Co Ltd v Fire Tech Systems CC & another* 2019 (2) NR 541 (SC).
[14] *Chico/Octagon Joint Venture v Roads Authority & others* (SA 81-2016) [2017] NASC (21 August 2017).

implementation of the decision which will form the subject matter of the main relief sought in the intended review as is evident from *Fire Tech Systems*, *Chico/Octagon* and *New Era Investment (Pty) Ltd v Roads Authority & others*.[15]

[27] The next question is simply, was it filed at the time when it was still feasible and practical to prevent an irreversible performance of the decision sought to be reviewed in the ordinary course. The answer in my view is that it was. It is correct that the formal agreement between Paragon and NAC had been entered into but apart from the paperwork nothing else had occurred. Menzies was still on site at HKIA and performing the ground handling services and without evicting them Paragon would not be able to render the services despite being contracted in this regard. The nature of the services was also such that a new supplier would be able to move in to replace Menzies within a relatively short period if and when Menzies had to cease rendering the services. It was not a construction contract where major construction work had already taken place. It was not a case where Menzies would, pending the review application, be conducting construction work that would further complicate an eventual hand over or leave the party entitled to the award to simply complete an insignificant task to finalise the services started by Menzies. In my view, a seamless take over from Menzies could virtually be effected at any time. There was thus no practical impediment standing in the way of granting interlocutory relief provided a case for such relief had been made out. It follows that, in the context of interim interdicts, there was no undue delay in bringing the application and the court *a quo*'s finding in this regard cannot be sustained.

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[15] *New Era Investment (Pty) Ltd v Roads Authority &* others 2017 (4) NR 1160 (SC).

New agreement to render ground handling services

[28] The court *a quo* found that the averments of the NAC that no such agreement came into place but that the status *quo* as it was prior to the judgment of the High Court remained in place pending the appeal to this Court was the 'most probable' interpretation.

[29] Whereas probabilities do play a role in the adjudication of interim interdicts it must be borne in mind that this must be done in a certain context. The way to approach a claim to a *prima facie* right is succinctly summarised in *LAWSA*[16] as follows:

> 'The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient but a weighing up the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed.'

[30] In this application for an interim interdict the order sought is to interdict the NAC from implementing the award of the ground handling services to Paragon pending the review instituted in the High Court, to set the award aside and pending the appeal to this Court in the eviction judgment. In the alternative, a temporary

[16] Joubert (ed) *The Law of South Africa* (2 ed) vol 11 para 404.

interdict is sought pending a 12 month termination notice in terms of a new (rental) agreement allegedly brought about by the notice to stakeholders given by NAC on 30 June 2022.

[31] As in the eviction order case counsel for Menzies disavowed reliance on the new agreement for purposes of hearing of the appeal. Counsel for Menzies also did not stress the interim interdict pending the eviction judgment appeal. The obvious reason for the latter concession is that as the outcome of the eviction order appeal was unfavourable to Menzies it would serve no practical purpose to find that such order should have been granted. This confines the issues in this case to whether Menzies made out a case for the interim interdict pending the review proceedings in the High Court, in circumstances where it has no other right to occupy the HKIA.

Prima facie right to remain the ground handler pending the review

[32] What a bidder is entitled to is that the competing bids will be considered in a fair process. Where this does not happen the bidder can review the process. There is no necessity for this right to be protected by a temporary interdict as the right to a fair process is protected by the review procedure. In fact, the Namibian Constitution underpins the right to review in Art 18 which provides that ‘administrative bodies and administrative officials shall act fairly and reasonably’ and in compliance with the requirements imposed on them by legislation and the common law and that ‘persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress in a court of law’. I accept for the purpose of this judgment, as counsel on

both sides accepted it, that the decision of the NAC to award the bid to Paragon was an administrative decision.

[33] In appropriate cases this right to a fair and transparent process may compel an aggrieved person to seek temporary injunctory relief where an irregular and invalid process was followed and where the implementation of the decision resulting from this irregular and invalid process pending the review may cause such aggrieved person substantial and/or irreparable harm or would be seriously deleterious to his or her rights.

[34] It follows that for Menzies to show, *prima facie*, that irregularities occurred in the award of the bid to Paragon does not, in itself, entitle it to the relief sought. Menzies must go further, and *prima facie* establish, that it would have been awarded the bid had the process to determine which bidder should be awarded the contract, been conducted fairly and free of the alleged irregularities.

[35] Menzies' bid was disqualified on the basis that its company registration documents were not certified as a true copies nor were all the pages constituting its bid initialled. The review panel upheld the disqualification of the Menzies bid in the following terms:

> 'The Panel observed that [Menzies' bid] did not conform with the mandatory requirements, as [Menzies] failed to initial some of its attachments in its bid document and did not certify the company registration documents as stipulated in the bid document requirements.'

[36] In the founding affidavit Menzies admits that not each page of its bid was initialled but maintains that those uninitialled pages 'forming part of the bid were not substantive, mandatory or prescribed documentation'. The disqualification on this basis is then attacked alleging that the officials who did this, in essence failed to consider these documents to ascertain their relevance or materiality to the bid and whether they were included for 'aesthetic or formatting purposes'. In short, a hullabaloo is made to indicate that the uninitialled and uncertified documents were of no moment when assessing the bid or contained matters within the knowledge of the NAC because of the long incumbency of Menzies prior to the receipt of the bid.

[37] It is not for the bidder to prescribe what the bid must contain. This is for the body or entity inviting the bids. Whereas these bid requirements must comply with the relevant statutory prescriptions, this does not prevent such entities from stipulating further requirements. Given the diverse nature of the goods and services that are involved when it comes to government or public enterprises it is obvious that the prescriptions in the Act are simply the minimum requirement(s) and not 'fit all' requirements in respect of government or public enterprises. Where a relevant entity invites bids, it stipulates its requirements, including compulsory requirements, such as the initialling and certifying of documents. It is common cause that the initialling of the bids was compulsory in respect of the bid under consideration. If Menzies was of the view that the uninitialled documents were not relevant to its bid it should not have included them in the bid. They were clearly not of that view and hence the inclusion of these documents. To now, after the event, attempt to distinguish them from the

initialled documents and to suggest only the initialled documents should have been considered can thus not be accepted. To put a burden on those who checked whether the bids complied with the formal compulsory bid requirements to consider the nature, relevancy and materiality of the uninitialled documents is not correct. It was clear from the requirements that bids that did not comply with the formalities would not be considered, ie be disqualified. This is not unfair to any bidder as they were made aware of these requirements and they should have adhered to them. It goes without saying that the uninitialled documents accompanied the bid for a purpose or they would not have been included in the bid. This being so, they should have been initialled or properly certified. It is not for the bidder to decide what the requesting body or entity would need and supply only such documents in the bid irrespective of the bid requirements and then cry foul if the bid is disqualified for not complying with the bid requirements.

[38] It follows from the above that whereas Menzies is fully entitled to attack the award to Paragon on the basis that, despite some of its documents not being initialled, it was not disqualified and also based on the other grounds raised by it. What it cannot do is to proceed on the basis that because Paragon's bid was not disqualified on the basis of non-compliance with the initialling requirements that all bidders who did not comply with these requirement should not have had their bids disqualified. The NAC is obliged to enforce the compulsory requirements equally and is not at liberty to ignore those requirements.

[39] Menzies' counsel submitted that Menzies' bid had to be considered because the uninitialled documents in its bid did not render the bid substantially unresponsive. For this submission he relied on para 27 of the 'Instructions to Bidders' (ITB) which reads as follows:

> '27.1 Prior to the detailed evaluation of the bids, the [NAC] will determine whether each bid (a) meet the eligibility criteria defined in ITB clause 4; (b) has been properly signed; (c) is accompanied by the required securities; and (d) is substantially responsive to the requirements of the bidding documents.
>
> 27.2 A substantial responsive bid is one which confirms to all the terms, conditions and specifications of the bidding documents without a material deviation or reservation. A material deviation or reservation is one (a) which affects in any substantial way the scope, quality or performance of the services; (b) which limits in any substantial way, inconsistent with the bidding documents, "the [NAC's] rights or the bidder's obligations under the contract"; or (c) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids.
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> 27.3 If a bid is not substantially responsive, it will be rejected by the [NAC], and may not subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation.'

[40] It seems to me that the requirements spelt out in sub-paras (a), (b) and (c) of para 27.1 of the ITB are standalone requirements the non-compliance of which would *per se* lead to disqualification from being awarded the bid. This follows from the fact that sub-para (d) of para 27.1 of the ITB which deals with 'substantially responsive bids' must be read with the definitions in para 27.2 of the ITB. The definitions in para 27.2 of the ITB which refers to compliance with the requirements of the ITB 'without

material deviation or reservation' is further clarified. The concept 'material deviation or reservation' is also defined. When this definition in para 27.2 of the ITB, which I have quoted above is considered, it is clear that this relates to the 'scope, quality or performance of the services tendered for or where the bid limits the rights of the NAC or the obligations of the bidders substantially compared to the ITB or whether the non-compliance with ITB is such that consideration of the proposal which is not strictly according to the ITB would unfairly affect the competitive position of the other bidders.

[41] The definition of 'material deviation or reservation' to explain what a 'substantially responsive' bid is clearly does not refer to the formal defects referred to in sub-para (a), (b) and (c) of para 27.1 of the ITB but refers to the manner in which the bids which comply with the mentioned sub-paras (where applicable) are to be approached when deciding which qualifying bid should receive the tender.

[42] This Court has not been referred to any general power of condonation in respect of the condonation of non-compliance with the peremptory requirements applicable to the bidding process and how the bidders had to present their bids. The one specific reference referred to by counsel on behalf of Menzies, namely para 21.7 of the ITB, does not deal with the position relating to the initialling and certification of documents and hence cannot assist Menzies. The only conclusion that can be reached is that the NAC was not obliged to evaluate the substance of the bid submitted by Menzies.

[43] Because of Menzies' admitted non-compliance with the aforementioned bid requirements, I am of the view that, whereas they may have made out a *prima facie* case for a review of the award to Paragon, they have not made out a *prima facie* case for the award of the tender to them. The *prima facie* case made out by Menzies is that Paragon should also have been disqualified and that the NAC could not evaluate the bids as it fell outside their mandate, as the value of the ground handling agreement exceeded NAC's threshold. This however does not assist them in the relief they sought where they themselves were, *prima facie*, correctly disqualified.

[44] It follows that the application was correctly refused. In the result I make the following order:

1. The condonation application in respect of the late filing of the notice to oppose and late filing of the power of attorney on behalf of first respondent succeeds and the said non-compliance by first respondent is condoned. The first respondent is to pay the costs of appellant in this regard, inclusive of the costs of one instructing legal practitioner and two instructed legal practitioners, and such costs shall include 15 per cent of the costs of the appellant for attendance at the hearing and of the hearing of the appeal.

2. The appeal is dismissed with costs inclusive of the costs of one instructing legal practitioner and two instructed legal practitioners. When

it comes to the attendance at the hearing and the hearing of the appeal the costs are limited to 85 per cent of such costs in respect of the first respondent.

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FRANK AJA

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MAINGA JA

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HOFF JA

APPEARANCES

APPELLANT:	R Heathcote (with him J P Ravenscroft-Jones) Instructed by Viljoen & Associates
FIRST RESPONDENT:	T Bruinders SC (with him U A Hengari) Instructed by Shikongo Law Chambers
SECOND RESPONDENT:	S Namandje (with him T Iileka-Amupanda)

Of Sisa Namandje & Co. Inc.