



CASE NO: SA 88/2023

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

DEPUTY SHERIFF FOR THE DISTRICT OF

WINDHOEK

Eleventh Respondent

MINISTER OF SAFETY AND SECURITY

Twelfth Respondent

NAMIBIAN CIVIL AVIATION AUTHORITY

Thirteenth Respondent

CALISTA GOABAS

Fourteenth Respondent

ARON KAURISA

Fifteenth Respondent

**EXECUTIVE DIRECTOR OF THE NAMIBIA
CIVIL AVIATION AUTHORITY**

Sixteenth Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 11 April 2024

Delivered: 3 June 2024

Summary: This appeal stems from a High Court decision dismissing Menzies Aviation (Namibia) (Pty) Ltd's (Menzies) application for a temporary interdict pending the finalisation of the review application by Menzies in respect of the award of the ground handling services at the Hosea Kutako International Airport (HKIA) to the second respondent which this Court dismissed in favour of the Namibia Airports Company (NAC) on appeal on 9 June 2023. As a result, the NAC notified Menzies to vacate the HKIA by 13 June 2023 prompting Menzies to bring an urgent application before the High Court seeking the following relief: (a) that the execution of the High Court order be suspended; (b) a declarator to the effect that the NAC was obliged to give Menzies reasonable notice to vacate the HKIA, additionally, that the demand made by the NAC was not reasonable and that it should be set aside; (c) that the staff and equipment of the Joint Venture between Paragon and Ethiopian Airlines (the JV) were wrongly certified; and, (d) the determination of Menzies' application for leave to appeal against the refusal of the interim interdict, and if leave is granted pending the appeal (in the Supreme Court). The court *a quo* granted the relief sought in (b). The court further found that a 30 day notice would constitute a reasonable notice. It declined to grant the reliefs sought in (c) and (d). Menzies appealed against the order of the High Court dismissing the relief sought in (c) and against the finding that 'a reasonable period of notice is 30 days' and the JV cross-appealed against the granting of the order in (b) above. Both the NAC and the JV opposed Menzies' appeal and the latter opposed the JV's cross-appeal.

On appeal, the court must determine the following issues: whether the court *a quo* was correct in finding that the notice given by the NAC to Menzies on 9 June 2023 to vacate HKIA by 13 June 2023 was unreasonable and invalid based on an agreement to this effect evidenced by the notice circulated to the stakeholders, including Menzies, dated 30 June 2022, (the cross-appeal of the JV); and whether the court *a quo* erred when it refused to set aside the certification of the personnel and the equipment of the JV as being fit for purposes for the ground handling services at the HKIA. The court must further determine whether in terms of the alleged new agreement, the eviction judgment could still be acted upon or whether its *causa* had fallen away at the time the alleged new agreement had been concluded.

A notice to cross-appeal was filed on behalf of the JV. The JV failed to file its notice opposing Menzies' appeal and a power of attorney authorising the legal practitioners to act on its behalf within 21 days of filing of the cross-appeal. This issue was taken up by Menzies in its heads of argument filed on 8 March 2024 in which counsel for Menzies submitted that this failure led to the lapsing of the cross-appeal. This prompted the JV to file a condonation application for leave to file a power of attorney authorising the legal practitioners for the JV to advocate its case before this Court.

Held that, the aim of a power of attorney is to prevent the party in whose name it is used to afterwards refute the actions taken on such party's behalf. Courts have never treated the failure to provide it timeously as strictly as is being suggested by the appellant – courts have in their discretion condoned this failure as evidenced in a multitude of decisions (see *Menzies Aviation (Namibia) Proprietary Limited v Namibia Airports Company Limited* (SA 73-2023) [2024] NASC (14 May 2024) para 17).

Held that, the court grants condonation for the late filing of the JV's power of attorney with an appropriate costs order.

Held that, the notice the NAC gave Menzies on 9 June 2023 – the day its appeal against the eviction judgment was dismissed – was not a notice to terminate any agreement but a notice that in terms of the judgment it had to vacate the premises.

Held that, a court order can clearly not expect someone to vacate in a period of time in which it would be factually impossible to do so. Secondly, a reasonable time would differ, depending on the circumstances of each case and where a person is unlawfully holding over a property it would equate to as quickly as it is practical and feasible to do so which would not necessarily be the same period as where one contracting party is to give the other a reasonable notice as different considerations may apply in the latter case relating to business interruption, obtaining alternative premises and the nature of the subject matter of the contract.

Held that, Menzies never indicated what it thought a reasonable notice period to vacate HKIA would be. The court *a quo* determined this period would be 30 days. When the NAC gave Menzies 30 days, Menzies launched an application in the High Court to set this notice aside.

Held that, this application lacked details as to why they could not hand over within the time stipulated which spoke to their *mala fides* in bringing the application. Menzies did not come up with any details as to why it was not possible for them to adhere to the notice and according to them it was for the NAC to establish that the notice was a reasonable one as on their say so it was not. This was clearly a tactical approach by Menzies to dispute virtually any notice to it that fell short of the one year benchmark they kept raising but did not persist with in this Court.

Held that, the cross-appeal by the JV against the order *a quo* declaring that the notice given to Menzies to vacate was unreasonable and invalid is upheld.

Held that, assuming that the certification process was flawed, Menzies has not made out a case as to why they are detrimentally affected by such breaches or that the

legislative requirements are put in place for their benefit (ie that Menzies would be able to continue to unlawfully act in accordance with the expired agreement it had with the NAC).

Held that, whether the JV is adhering to their contractual provisions with the NAC or with their statutory duties is in this Court's view an issue which does not justify the stay of the eviction order in the circumstances.

It thus follows that the appeal against the order *a quo* refusing to grant the order relating to the certification issue stands to be dismissed and the cross-appeal against the order that the notice given by the NAC on 9 June 2023 to Menzies to vacate the premises of the HKIA by 13 June 2023 was unreasonable is upheld.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and HOFF JA concurring):

Introduction

[1] The appellant (Menzies) was contracted by the first respondent (NAC) to render ground handling services at the Hosea Kutako International Airport (HKIA) from January 2014 for a period of 5 years. This contract was renewed for 3 years which led to a termination date of 31 December 2021.

[2] Prior to the termination date and in August 2021 bids were invited by the NAC for the ground handling services at HKIA and a further extension of the agreement with Menzies was concluded up to 30 June 2022. Menzies and the second respondent (the JV) were among the bidders for the new contract to provide ground

handling services at HKIA for a five year period. Menzies' bid was disqualified for not complying with the compulsory tender requirements in that each page of the bid was not initialled and for not providing certified copies of its company registration documents. Its bid was thus not further evaluated. The JV was selected from those bids that qualified for the award of the contract. Menzies took the decision to disqualify its bid to the Review Panel constituted in terms of s 58 of the Public Procurement Act 15 of 2015 but the review was dismissed in February 2022.

[3] Subsequent to the decision by the Review Panel, the NAC gave Menzies a month's notice to terminate the agreement but when Menzies objected the NAC indicated that it would stick to the original termination date of 30 June 2022 contained in the extended agreement. In between the correspondence relating to the termination of the extended agreement, Menzies on 11 April 2022 launched a review application in the High Court against the award of the bid to the JV.

[4] Undeterred by the review application the NAC sought the assurance from Menzies that it would vacate the premises at HKIA and hand over the ground handling services to the JV on termination of their agreement with the NAC on 30 June 2022. When this assurance was not forthcoming the NAC launched an urgent application for a declarator that the agreement with Menzies would terminate on 30 June 2022 and that the latter had to vacate the premises it occupied at HKIA as part of the ground handling services and should this not be done that the Deputy Sheriff be authorised to evict them.

[5] Menzies opposed the application on the basis that there was a tacit relocation of the agreement and furthermore raised a collateral challenge based on a legal point that the scope of the tender was such that it had to be determined by the Central Procurement Board of Namibia and not by the NAC. It further in a counter-application sought a temporary interdict that the award to the JV should not be implemented pending the finalisation of the review application to allow it to continue with the ground handling services.

[6] The High Court on 29 June 2022 granted the order sought by the NAC and struck the application for the temporary interdict from the roll because of the non-joinder of the chairperson of the review panel (the eviction judgment). Menzies noted an appeal against the eviction judgment in August 2022 and in October 2022 filed a fresh an application seeking an interim interdict allowing it to continue with the ground handling services pending the finalisation of the review application pending in the High Court.

[7] On 30 June 2022 Menzies informed the NAC that it would appeal the decision of the High Court and as its appeal against the decision of the High Court suspended that judgment, it would continue to render the ground handling services pending such appeal this prompted the NAC to forward a circular to its stakeholders at HKIA (including Menzies) informing them that Menzies would continue to deliver such services 'until further notice'. Menzies then launched the new application for a temporary interdict mentioned above during October 2022.

[8] On 23 May 2023 the High Court dismissed the application for a temporary interdict pending the review (the interdict judgment) and on 9 June 2023 this Court dismissed the appeal against the eviction judgment granted in favour of the NAC. As a result, the NAC notified Menzies to vacate HKIA by 13 June 2023. This prompted another urgent application by Menzies which is the subject matter of this appeal. In this application the following reliefs were sought by Menzies:

- (a) that the execution of the High Court order (as confirmed by this Court) be suspended pending (b), (c) and (d) below.
- (b) a declarator to the effect that the NAC was obliged to give Menzies reasonable notice to vacate HKIA and that the demand that was made was not reasonable and as far as it was required that the demand (notice) be set aside.
- (c) the certification by 14th, 15th and 16th respondents that the JV's staff and equipment are fit for purpose and alleging the personnel and equipment already certified were wrongly so certified; and
- (d) the determination of Menzies' application for leave to appeal against the refusal of the interdict, and if leave is granted pending the appeal in this Court.

[9] The High Court granted the relief sought in para (b) above and also stated in the judgment that a 30 day notice would constitute reasonable notice. The relief sought in paras (c) and (d) mentioned above were declined.

[10] Menzies appealed against the order of the High Court dismissing the relief sought mentioned in para (c) above and against the finding that 'a reasonable period of notice is 30 days'. The JV cross-appealed against granting of the order in para (b) above. The NAC and the JV opposed Menzies' appeal and the latter opposed the cross-appeal of the JV.

Appeal and cross-appeal

[11] This appeal against the notice period of 30 days by Menzies was conditional and was stated in the notice of appeal as follows:

'... is noted only in as far as it is possible in law to execute or implement a paragraph in a judgment as if that paragraph is a discrete and separate order capable of execution'

[12] In this Court Menzies submitted that an appeal against the 30 day notice period was not possible as there was no order to this effect as it was simply mentioned *en passant* in the judgment after the court *a quo* already determined that reasonable notice had to be given and that the notice that was given had to be set aside as being unreasonable. Instead, Menzies submitted that the 30 day notice finding by the court *a quo* should be set aside pursuant to this Court's review

jurisdiction in terms of s 16 of the Supreme Court Act 15 of 1990. This, according to counsel for Menzies, should be done because the question of what would be a reasonable notice period was not raised in the papers nor in argument in the court *a quo*. It was simply approached to declare that the notice given by the NAC on 9 June 2023 to Menzies to vacate the HKIA by 13 June 2023 was unreasonable and had to be set aside. The court *a quo* did this and once this was determined it turned to determine what it would regard as a reasonable notice which was not an issue before the court *a quo*.

[13] The NAC, relying on the finding that the 30 day notice would be reasonable notice, gave Menzies such notice. Not surprisingly, given the ongoing dispute between the NAC and Menzies and the latter's determination not to yield its *de facto* monopoly in respect of the ground handling services at HKIA, it (Menzies) contested the reasonableness of this 30 day notice and this dispute is currently pending in the High Court.

[14] The JV filed a cross-appeal against the declarator that the notice of 9 June 2023 demanding that Menzies vacate the premises by 13 June 2023 was unreasonable and had to be set aside. In its grounds of appeal the JV took issue with the fact that the court *a quo* dealt with the notice as one in terms whereof a new contractual obligation (reasonable notice) arose instead of dealing with it as a matter where the eviction judgment is sought to be enforced, ie a notice that as the appeal against the eviction judgment had been dismissed Menzies was bound to vacate

HKIA 'immediately' or face eviction. The grounds of appeal also expressly attacks the finding that 30 day's notice was reasonable.

[15] Menzies submits that the JV is not entitled to appeal this judgment as the NAC does not. The submission is that the JV's occupation of HKIA is a derivative right derived from their agreement with NAC and hence the NAC's stance in respect of the appeal is binding on the JV. I do not agree. The JV was cited as a party in the application because it has an interest in the matter as the contract it has with NAC had been agreed to and signed and Menzies is attempting to attack their contractual right to commence with this contract. This interest was affected by the judgment of the court *a quo* and the fact that the NAC did not see it necessary to protect this right, as it probably thought the 30 day notice period would suffice, did not prevent the JV from protecting their contractual rights against interference from Menzies which was not a party to the contract. The failure by the NAC to assist them in protecting their contractual rights is a matter between the NAC and the JV but does not, in the circumstances of this matter, disqualify the JV from asserting and protecting their contractual rights with the NAC against interference from Menzies.

[16] The JV, despite filing a cross-appeal timeously did not timeously file the power of attorney authorising their legal practitioner to act for them in this appeal. This issue was raised in the heads of argument filed on behalf of Menzies. As will become evident herein below the JV sought condonation for this non-compliance and in this application for condonation this non-compliance is addressed.

[17] Menzies filed an answering affidavit in respect of the condonation application the morning this appeal was heard. In the answering affidavit they deal with issues relating to the late filing of the resolution and the power of attorney but a wholly new point is also raised which did not flow from the issues relating to the late filing of the power of attorney or any issue germane to it. The point is belatedly raised that the JV perempted its appeal by reference to statements made by Messrs Amunyela and Jacobs and the JV's legal representative at a press conference on 9 June 2023 and subsequent to Menzies appeal against the eviction judgment being dismissed by this Court. In view of the manner in which and the time when this issue was raised I decline to deal with it. It should have been raised earlier and not at the time when the JV would have been unable to respond meaningfully thereto because of the potential prejudice to the case of the JV.

[18] From the above discussion, it is evident that the issues in this appeal are as follows:

- (a) was the court *a quo* correct in its finding that the notice given by the NAC to Menzies on 9 June 2023 to vacate HKIA by 13 June 2023 was unreasonable and invalid based on an agreement to this effect evidenced by the notice to stakeholders circulated to the latter, including Menzies, dated 30 June 2022, (the cross-appeal of the JV); and

- (b) did the court *a quo* err when it refused to set aside the certification of the personnel and the equipment of the JV as being fit for purpose for the ground handling services at the HKIA (the appeal of Menzies)?

Condonation application in cross-appeal

[19] In terms of rule 7(4) of this Court's Rules where a respondent in an appeal opposes the appeal and intends to cross-appeal such respondent must within 21 days of receipt of the notice of appeal file a notice to oppose the appeal and file a notice to cross-appeal. Where a respondent is represented by a legal practitioner the latter must within 21 days of the filing of the notice to oppose the appeal and to cross-appeal file a power of attorney authorising such legal practitioner to oppose the appeal and prosecute the cross-appeal on behalf of such party.

[20] A notice to cross-appeal was filed on behalf of the JV timeously setting out the grounds on which the order of the High Court was assailed. No notice of opposition to the appeal by Menzies was filed nor a power of attorney authorising the legal practitioners to act on behalf of the JV within 21 days of the filing of the cross-appeal. In their heads of argument filed on behalf of Menzies on 8 March 2024 counsel for Menzies submitted that this led to the lapsing of the cross-appeal.

[21] Not surprisingly the stance taken in the heads of argument triggered a condonation application on behalf of the JV seeking leave to file a power of attorney dated 19 March 2024 authorising the legal practitioner for the JV to advocate its case before this Court.

[22] The legal practitioner for the JV explains that he filed the notice of cross-appeal on 18 August 2023. On the morning of 19 August 2023 when the Deputy Sheriff attended to the eviction of Menzies, the latter lodged this application on an urgent basis in the High Court. He thus started working on this application on behalf of the JV which is now the subject matter of this appeal. Yet another application was launched in the High Court by Menzies. In addition, he had to attend to other matters as well. This was the circumstances in which he 'inadvertently, and yet regrettably', omitted and forgot to file the power of attorney. He realised this omission when he saw the point taken in the heads of argument filed on behalf of Menzies during the weekend of 16-17 March 2024. The condonation application was filed on 22 March 2024. It is further evident from his affidavit that the JV at all times intended to cross-appeal and oppose the appeal and they also instructed him to file the cross-appeal.

[23] As is evident from the decisions of this Court in the eviction judgment with regard to Menzies's contention that the ground handling agreement it had with NAC was tacitly relocated and its contentions made in the interim interdict judgment that yet another contract with the NAC came into existence from a notice to stakeholders, it was clearly important for Menzies to, through its litigation strategy and the delays inherent in the legal system, extend their *de facto* monopoly in respect of the ground handling services for as long as possible. I thus have sympathy for the legal practitioner of the JV who had to respond to this tyranny of litigation by Menzies.

[24] I am thus satisfied that the JV, through its legal representative, has provided reasonable explanation for the late filing of the notice to oppose and the power of attorney.

[25] It is submitted on behalf of Menzies that the non-filing of the power of attorney led to the cross-appeal of the JV lapsing. Reference is made to a number of cases where non-compliance with certain rules of this Court led to the conclusion that the appeal had lapsed. Some of the rules explicitly state this, eg late filing of the record (rule 9(1)(c) – the appeal is deemed to be withdrawn) and/or the failure by an appellant to file heads of argument timeously (rule 17 – the appeal lapses). When it comes to failure to timeously file a power of attorney the rule relating to this issue (rule 7(6) and (7)) does not state that the failure to file a power of attorney timeously causes the appeal to lapse. It should also be borne in mind that powers of authority are only relevant when parties use legal practitioners to act on their behalf and not where they act in person.

[26] The failure to provide a power of attorney timeously has never been treated as strictly as is being suggested on behalf of Menzies. A power of attorney is aimed at preventing the party in whose name it is used to afterwards refute the actions taken on such party's behalf.¹ The failure to file such power timeously has been condoned in many cases by the courts in their discretion.² Reference to some of these cases is made in the judgment of this Court in the appeal in respect of the refusal of the

¹ *Estate Matthews v Ells* 1955 (4) SA 457 and *Hills & others v Taxing Master & another* 1975 (1) SA 856 (N) and *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 83.

² *Southern Assurance Co. Ltd v Somdaka* 1960 (1) SA 588 (A).

interim interdict by the High Court at para 17 and I do not repeat it here.³ Indeed in one old case, the matter was allowed to proceed without the need to file a power of attorney.⁴

[27] In the appeal in respect of the interim interdict judgment a power of attorney handed in at the hearing was accepted by this Court. This was done, as indicated in that judgment, because the power of attorney did on the face of it constitute a proper and valid one clearly indicating a decision by the board of the NAC as it was signed by the board members and granted the power to the Chief Executive Officer to appoint legal practitioners to represent the NAC in litigation including appeals. In this matter a document which purports to be a 'special resolution' of the JV dated 14 August 2023 and a 'special power of attorney' dated 15 August 2023 to appoint the JV's legal practitioners of record accompanied the condonation application.

[28] Unfortunately, neither of these documents are, *ex facie*, satisfactory. The resolution states that it is passed by 'Paragon Investment Holdings (Pty) Ltd Joint Venture Ethiopian Airlines' at Windhoek. It states that the JV appoints Desmond Amunyela to act on its behalf in this appeal and also that it appoints its current legal practitioners of record to represent it in this appeal. It is then stated to be 'certified a true extract' and signed by Desmond Amunyela. *Ex facie* of the resolution there is no signature on behalf of the two parties to the JV namely Paragon Investment Holdings (Pty) Ltd nor Ethiopian Airlines Group. Although the sole signatory of the resolution is Desmond Amunyela, the capacity in which he signed it is not stipulated. A Joint

³ *Menzies Aviation (Namibia) Proprietary Limited v Namibia Airports Company Limited* (SA 73-2023) [2024] NASC (14 May 2024). See also A C Cilliers, C Loots and H C Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* 5 ed (2009) vol 1 at 273.

⁴ *Rossouw's Executive and Heirs v Rossouw's Executives* (1894) 11 SC 306.

Venture normally indicates a partnership in respect of the joint venture involved and there is nothing, when it comes to partnerships which make a resolution signed by someone who is not a partner binding on the partnership (JV) because it is stated to be 'certified a true extract'. In company law a resolution signed by the chair of the board certified as a true extract may constitute *prima facie* evidence of such resolution.⁵ This is not the position when it comes to JVs (partnerships). Thus the resolution, on the face thereof, is not signed by either of the JV parties and hence cannot bind the JV nor can it authorise on behalf of the JV, those that it purports to authorise to act on behalf of the JV.

[29] The 'special power of attorney' records that Desmond Amunyela 'In my own capacity and in my capacity as the appointed representative of the second respondent' (the JV) appoints the current legal representative of the JV to act on its behalf in this appeal. Mr Amunyela in his personal capacity has nothing to do with this appeal and is not a party to the proceedings at all. He is, at most, a witness for the JV. As appointed representative of the second respondent (the JV) he may have the power to appoint a legal representative if so authorised by the JV. The resolution attached to the condonation application does indeed appoint him and the current legal practitioners of record but, as pointed out above, does not on the face thereof appear to emanate from the JV.

[30] Had the mentioned resolution and the power of attorney been the only evidence of the appointment of the legal practitioner of record, as is usually the case

⁵ Section 250(g) of the Companies Act 28 of 2004 relating to the signature of the minutes of a meeting.

in appeals to this Court, I would not have hesitated to find that the authority of the legal practitioners of record in respect of the JV had not been established.

[31] I have pointed out in the appeal against the refusal of the granting of an interim interdict that legal practitioners acting for litigants in this Court should see to it that proper powers of attorney be filed and that there is no excuse for this not being done. This Court will in the normal course, where it is only from the power of attorney, that the legal practitioner's authority is apparent, not hesitate to strike an appeal from the roll where such power of attorney is deficient and does not establish the fact of such authority. The whole point of the rule requiring that powers of attorney be filed is to avoid disputes with regard to the authority of legal representatives to represent their clients in this Court.

[32] In this matter, because of the history of the protracted litigation between the parties relevant to the issues in dispute, this Court is, in addition to the presented resolution and power of attorney, aware of facts that further throw light on the issue of the authority of the legal practitioners of record to represent the JV. First, in terms of the instructions to bidders the JV had to appoint a person to represent it in all its dealings with the NAC. This person was Mr Amunyela. Second, Mr Amunyela and a Mr Jacobs are executive directors of Paragon Investment Holdings (Pty) Ltd. Third, the same lawyers represented the JV, who were cited as such despite some misgivings by Menzies, both in the court *a quo* and in this Court in both the appeals against the eviction judgment and the interim interdict judgment and again in the High Court in this matter. Fourth, in submitting that the cross-appeal by the JV was

perempted, Menzies relies on what happened at the press conference where the JV was represented by Messrs Amunyela and Jacobs and its current legal practitioners of record impliedly acknowledging that those persons could act on behalf of the JV when it comes to this appeal. Fifthly, what are the chances that Ethiopian Airlines, who operates regular flights to and from HKIA, is not aware of the ongoing litigation between the parties which has been covered extensively in the public media and that it would not have taken any steps to disassociate itself from the litigation had they not agreed to be a party to it as one of the JV parties?

[33] In my view, the history of the matter, taking into account the plethora of litigation involved between the parties and the publicity accompanying it in the public media is such that I am satisfied that the current legal practitioners acting on behalf of the JV have been authorised by the JV to act on its behalf and that Mr Amunyela as 'the duly appointed representative' of the JV as asserted in the special power of attorney' had the authority to appoint the mentioned legal practitioners for the purposes of this appeal.

[34] I am however of the view that the ineptness in the manner in which both the resolution and 'special power of attorney' were drafted and presented in the condonation application must have consequences. The requirements for powers of attorney have long been settled and should be adhered to. The whole purpose of filing powers of attorney is to avoid the authority of those acting for litigants being queried and this will seldom arise if proper powers of attorney are filed. Because of the inept manner in which the issue was dealt with in this appeal it caused an

unnecessary waste of time at the hearing and forced this Court to deal with the matter in this judgment that could have been avoided if the power of attorney was drawn up with reference to the criteria that needed to be addressed when settling such a document which is neither obscure nor unavailable. The time and effort wasted in this respect justifies an adverse court order against the JV.

[35] As far as the JV sought condonation for the late filing of the power of attorney it sought the indulgence of this Court. Not only was the opposition to this application reasonable, but the power of attorney was ineptly worded and also necessitated the consideration of facts outside the power of attorney to establish whether the legal practitioner of record for the JV was indeed authorised to act for it. In addition, as a result of the manner in which the resolution and the power of attorney were worded, a lot of time was unnecessary spent on this issue at the hearing of the appeal. In my view the appropriate order should be that the JV should pay the costs of the condonation application on a legal practitioner and client scale and that these costs should include 15 per cent of the costs of attendance and in respect of the hearing of the appeal.

Proceedings in the court *a quo*

[36] Menzies launched an urgent application when, after the dismissal of their appeal against the eviction judgment on Friday 9 June 2023 the JV notified them, that they expected them to vacate HKIA by Tuesday 13 June 2023. This application sought to suspend the eviction order granted by the High Court, per Sibeya J (and confirmed by this Court) in the terms set out in para [8] above.

[37] The court *a quo* found that the NAC had to provide reasonable notice to Menzies on the basis that the 'notice to stakeholders' that was circulated amongst stakeholders such as airlines and Menzies subsequent to the appeal noted against the eviction order granted by Sibeya J and which informed the stakeholders that Menzies would remain the service provider in respect of ground handling services at HKIA 'until further notice' meant that the NAC was contractually bound by this new arrangement. It further found that the notice by the NAC on 9 June 2023 was not reasonable and hence invalid. It also stated that a 30 day notice would be reasonable notice in the circumstances.

[38] In respect of the relief based on the certification of the staff and equipment of the JV, it was dismissed. The judgment *a quo* states that 'the basis on which the relief is sought has not been established and I therefore decline' the relief sought.

[39] The relief relating to the application for leave to appeal the dismissal of Menzies' application for an interdict *pendente lite* was likewise declined. There is no appeal against this finding of the court *a quo* and needs no further consideration.

[40] The court *a quo* with reference to case law in respect of contracts including the *locus classicus* of *Tiopaizi v Bulawayo Municipality*⁶ held that the NAC had to give Menzies reasonable notice to vacate HKIA and that the period given on 9 June 2023 was not reasonable and hence invalid. In conclusion in this respect the court stated '. . . I find that the reasonable period of notice is thirty days'.

⁶ *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 326.

[41] It should be pointed out that the relevance of reasonable notice followed from the finding by the court *a quo* that the notice of 30 June 2022 by NAC to stakeholders was a 'unilateral act which the NAC intended to create binding legal obligations between it and Menzies'. According to the court *a quo* it thus followed that NAC was 'bound by the undertaking or agreement' (that Menzies will continue to render ground handling services until further notice). Building on this proposition, reference was then made by the court *a quo* to the fact that parties should be held to their contracts freely entered into and that this was in the public interest as well as a constitutional imperative.

Stay or suspension of execution

[42] Stay or suspension of execution is an order that the court *a quo* could grant in the exercise of its discretion. For this to be done it must be shown that real and substantial justice requires such stay. The position is succinctly summarised by Tebbutt J in *Strime v Strime*⁷ as follows:

'Execution is a process of the Court and the Court has an inherent power to control its own process subject to the Rules of the Court. It accordingly has a discretion to set aside or stay a writ of execution (see *Williams v Carrick* 1938 TPD 147 at 162; *Graham v Graham* 1950 (1) SA 655 (T) at 658; *Cohen v Cohen* 1979 (3) SA 420 (R) at 423 B-C). The Court will, generally speaking, grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice would otherwise be done.'

⁷ *Strime v Strime* 1983 (4) SA 850 (C) at 852 A-B.

[43] When it comes to setting aside a writ of execution (eviction) the position is somewhat different. Here the general rule is where the writ of execution is not supported or no longer supported by its *causa*, ie the cause of action and the judgment granted in respect thereof it will be set aside.⁸ It seems to me that in the present matter and based on the case for Menzies this is the course that should have been taken. On their version the lease agreement between Menzies and the NAC had been substituted by one which could only be terminated by reasonable notice. In other words, the agreement that expired through the effluxion of time on 30 June 2022 no longer supported a writ of eviction. On the version of the JV, a stay of execution would remain relevant as the court would then simply stay the execution of the eviction order to allow Menzies to adhere to the eviction order within a specified period of time.

[44] The question as to whether a stay of execution pending the proper certification of the personnel and equipment of the JV was to be considered or whether the certification issue had to be considered wholly on its own is somewhat different. This is because the certification issue has nothing to do with the issue relating to Menzies' entitlement to a stay on as the ground handler at HKIA pending the finalisation of a review of the award to the JV or pending a valid notice being given to Menzies by the NAC. If there is a new agreement as alleged by Menzies then, as pointed out above, the *causa* for the writ of execution falls away and the writ issued in respect of the eviction judgment cannot be used for purposes of the eviction of Menzies and the

⁸ *Le Roux v Yskor Landgoed (Edms) Bpk en Andere* 1984 (4) SA 252 (T) at 257 B-C. See A C Cilliers, C Loots and H C Nel *Herbstein and van Winsen: The Practise of the High Court of South Africa* 5 ed (2009) vol 2 at 1092.

relief must then be discussed on a standalone basis. If the alleged new agreement is found not to exist and all that Menzies did was to enforce the eviction judgment then, of course, this relief must be determined on the basis that the writ of eviction should be stayed pending determination of the issue of certification.

[45] It is thus necessary to deal with the alleged new agreement first to determine whether the eviction judgment could still be acted upon or whether its *causa* had fallen away at the time the alleged new agreement had been concluded.

New agreement

[46] In the eviction application, Menzies' stance was that there was a tacit relocation of the ground handling agreement and that because the ground handling agreement was in effect a rental agreement in respect of business premises it could only be terminated on 12 months' notice. The reliance on the Rents Ordinance 13 of 1977, which stipulates the 12 months' notice period, arose because the last iteration of the ground handling agreement provided for a notice period of one month. The reliance on the ground handling agreement being a rental agreement was abandoned for purposes of the appeal and this Court thus did not deal with this aspect at all in its judgment in respect of the eviction judgment.

[47] In the application for an interim interdict a new defence is raised, namely that a circular to all stakeholders, including Menzies by the NAC subsequent to the notice of appeal against the eviction judgment by Menzies which stated that Menzies would continue to be the ground handler at HKIA 'until further notice' constituted a new

agreement and that Menzies was thus entitled to remain the ground handler until reasonable notice to the contrary had been given to it by the NAC. It was again asserted that (albeit in the alternative) that Menzies' entitlement to stay on the premises based on this new agreement amounted to a rental agreement which agreement could only be terminated on 12 months' notice. The application for an interim interdict was dismissed and Menzies appealed to this Court with leave of the court *a quo*. At the hearing of this appeal counsel for Menzies disavowed any reliance on this new agreement.

[48] In the present appeal counsel for Menzies disavowed reliance on the new agreement being a rental agreement and submitted that the new agreement was one that could be terminated on notice which implied a reasonable notice period which he maintained was not given in this matter. The stance of the NAC (and the JV) all along was that there was no tacit relocation and what prevented the eviction of Menzies earlier was the latter's appeal in the eviction judgment which suspended the orders granted in that judgment. That the circular distributed among the stakeholders at HKIA, including Menzies which stated that they would be given notice if the situation changed did not contain a new agreement but was simply a statement that the stakeholders would be notified of further developments in this regard which would depend on the result of the then pending appeal.

[49] What is clear from the history of the matter is that the NAC, subsequent to the award of the bid to the JV and Menzies' failed attempt for relief at the Review Panel, was keen for the JV to take over the ground handling services at HKIA. The NAC

gave Menzies one month's notice to terminate the extended agreement on 31 March 2022 effective at the end of April 2022. Menzies disputed this notice and shortly thereafter instituted review proceedings currently pending in the High Court. The NAC withdrew its March 2022 notice but sought confirmation from Menzies that it would vacate HKIA on the termination of the extended ground handling agreement on 30 June 2022. Menzies on 26 April 2022 approached the NAC to seek an extension of the agreement pending the finalisation of the review it had instituted. The NAC however repeated the request to Menzies to give it an undertaking to vacate the premises on 30 June 2022. Menzies answered by seeking a response from the NAC in regard to its request for an extension of the agreement pending the determination of the review. On 22 May 2022 NAC informed Menzies that it would not extend the agreement beyond 30 June 2022 and that it would approach the court for urgent relief which it did on 27 May 2022 when it instituted the application that led to the eviction judgment declaring that the agreement between the NAC and Menzies would terminate on 30 June 2022 and that Menzies should, on that date, hand over the services and vacate HKIA failing which the Deputy Sheriff was authorised to evict them from HKIA.

[50] The eviction judgment granted the relief sought by the NAC and Menzies timeously filed a notice to appeal against the judgment on 30 June 2022. This meant that the orders of the High Court were suspended pending the appeal. This follows in terms of the common law and rule 121 of the High Court. The practical effect of the suspension was that Menzies carried on with the provision of the ground handling services as before, ie as if there was a tacit relocation. It also through its legal

practitioners addressed a letter to the NAC on 30 June 2022 informing it that the effect of the noting of the appeal was to suspend the eviction judgment stating that 'Evicting our client in the face of an appeal would thus be mala fide, illegal and also constitutes spoliation'. The letter from Menzies concludes that 'while the appeal is pending our client will continue to render the services as before'.

[51] The NAC faced with a *fait accompli*, also on 30 June 2022 informed the stakeholders, such as airlines making use of the airport or the ground handling services as follows in a 'Notice to Stakeholders' which included Menzies:

'Re: Namibia Airports Company / Ground Handling Services at Hosea Kutako International Airport (HKIA).

Kindly take notice that Menzies Aviation will continue to provide ground handling services at HKIA until further notice.'

[52] It is in the above context that the circular and the statement that the status *quo* with regard to the ground handling services would continue 'until further notice' must be considered.

[53] The notice was required to inform the stakeholders (other than Menzies) that the ground handler would not change despite the eviction judgment and that Menzies would continue to render these services until they were notified to the contrary. There was no need to inform Menzies of this as they had already stated this in the letter quoted above. This would only happen subsequent to the determination of the appeal

that was lodged by Menzies against the eviction judgment and would furthermore depend on the outcome of the appeal. The pending appeal suspended the eviction order and as pointed out by Menzies they could during this period continue with the services at HKIA based on their alleged tacit relocation of the ground handling services pending the appeal. From the parties' perspective on 30 June 2022 the likelihood of the appeal being finalised within the next year was small and by the noting of the appeal Menzies bought itself at least another year as ground handler pending the appeal and review application. With hindsight we now know that this appeal was merely a litigation strategy to allow it to carry on with a *de facto* monopoly and there was no merit at all in the tacit relocation point. There was thus no need for the NAC to enter into a new agreement with Menzies so as to allow them to continue with the ground handling services as the litigation strategy gave them such extension. The NAC was keen to hand over the ground handling services to the recently identified contractor, the JV, and they did everything legally in their power to accelerate this process. They sought urgent relief to ensure Menzies vacate the premises and hand over the ground handling services and they flatly denied a request to extend the agreement pending the review application launched by Menzies. Why would they now suddenly when faced with the prospects of having to deal with Menzies, on the probabilities, for at least another year on the exact same terms and conditions, enter into a new agreement, which on the current version of Menzies endures indefinitely and would only be terminable on reasonable notice when all previous agreements had fixed termination dates and the last extension to 30 June 2022 could be terminated on 30 days' notice? This when the agreement was *de facto* extended due the operation of law pending the decision of the Supreme Court. It

simply made no sense from the point of view of the NAC and Menzies knew this because they bore the brunt of the attempts by NAC to terminate the relationship between them.

[54] What was clearly intended by the circular to stakeholders was not to alter the agreement with Menzies but to inform those involved that the newly identified ground handler would not take over but Menzies would continue until further notice. A fixed time for them for the handover could not be given because of the appeal and the potential outcomes of the appeal. This was clearly meant to inform the stakeholders that further notice would follow subsequent to the legal processes being concluded.

[55] It is common cause that the circular was not addressed to Menzies or any specific addressee, but simply circulated to stakeholders at the airport. In this context Menzies received it simply to take note of the contents, namely that the other stakeholders were informed that it would continue to render the ground handling services until NAC had notified the other stakeholders to the contrary. There would be no need to notify Menzies of anything because as a party to the appeal it would be aware of the outcome of the appeal and what results would flow from it, ie eviction or, if Menzies was successful, notice in terms of the tacitly relocated agreement.

[56] To deal with the circular in isolation without the background context is not correct. Seen in context and the fraught relationship between the NAC and Menzies it is abundantly clear and it is obvious that the NAC would not extend the contract voluntarily beyond what the litigation strategy of Menzies demanded. The circular was

not intended to reinstate the very same agreement that the parties had litigated about and which was a subject matter of the appeal but with a more generous notice period than the one supposedly tacitly relocated. On the contrary, as far as Menzies was concerned, it simply had to take note that the stakeholders had been informed of the status *quo* pending the appeal and everyone would in due course be notified what the position would be subsequent to the judgment of the Supreme Court.

[57] Menzies latches onto this notice to submit that it constituted a new (rental) agreement for the ground handling services between it and the NAC. This is the exact same agreement that Menzies' counsel conceded was not a lease agreement when they abandoned a notice point in this Court when their appeal against the judgment of Sibeya J was heard and similarly disavowed reliance on this point in the appeal relating to the interim interdict. In this appeal the point that it was a rental agreement was similarly not persisted with and Menzies banked this defence (reasonable notice which amounted to 12 months) in both the previous appeals and when it had nothing more to offer when faced with a writ of eviction, the undefined reasonable notice period was the only point left in its arsenal and they thus reverted to it. In any event, seen in context, the submission in this regard is at odds with the facts. It is clear that the NAC was simply informing its stakeholders that pending the appeal against the judgment of Sibeya J, Menzies would continue rendering the ground handling services 'until further notice' which notice was clearly intended and understood to mean that subsequent to the judgment by the court of appeal the parties would be notified as to the ground handler going forward. To suggest there was an agreement to the effect that Menzies would benefit irrespective of the outcome of the appeal, ie if

successful stay based on a tacit relocation and if unsuccessful stay on pending another reasonable period, which was initially stated to be a year based on the Rents Ordinance, but which was ultimately reduced to a reasonable period. What a reasonable period would be, Menzies and their counsel declined to suggest. I have no hesitation to reject this reasonable notice point based on an alleged new agreement entered into between the NAC and Menzies.

[58] It follows that the notice the NAC gave to Menzies on 9 June 2023, being the day its appeal against the eviction judgment was dismissed, was not a notice to terminate any agreement but a notice that in terms of the judgment it had to vacate the premises. This the NAC stated had to be done by 13 June 2023.

[59] It further follows that the eviction judgment could be relied upon failing which the NAC would be entitled to call upon the deputy sheriff to evict Menzies from HKIA. The eviction judgment did not grant any time period within which to vacate the premises which meant it had to be done immediately. If it was impossible from a practical and feasibility point of view to do this Menzies would have been entitled to seek a stay of the writ of eviction for a period to be determined by the court.⁹ This would be done in the discretion of the court based on the criteria of real and substantial justice referred to above.

[60] The notice to Menzies to vacate HKIA gave it 'three days' notice, two of which fell on a Saturday and Sunday, and within ten hours after having served their last

⁹ *E. P. Du Toit Transport (Pty) Ltd v Windhoek Municipality* 1976 (3) SA 818 (SWA).

flight'. On behalf of Menzies it is submitted that as the eviction judgment did not provide any time within which Menzies had to vacate that meant it had to vacate within a reasonable time. To a certain extent the submission is correct. A court order can clearly not expect someone to vacate in a period of time in which it would be factually impossible to do so. Secondly, a reasonable time would differ, depending on the circumstances of each case and where a person is unlawfully holding over a property it would equate to as quickly as it is practical and feasible to do so which would not necessarily be the same period as where one contracting party is to give the other a reasonable notice as different considerations may apply in the latter case relating to business interruption, obtaining alternative premises and the nature of the subject matter of the contract.

[61] Menzies states in its founding affidavit that the demand (notice) to vacate premised on the eviction judgment was 'wholly unreasonable' for the following reasons:

- (a) It was impossible to handover to the JV in such short period as it employed 133 persons at HKIA and it would create a security risk if it had to give such short notice to their employees that their contracts would be terminated. I am not persuaded that this reason carries much weight. Surely Menzies must have informed the employees that there was a risk that their employment would have to be terminated if they lost their appeal against the NAC. If they did not do this it was highly irresponsible conduct by them and they should not be allowed to benefit

from such conduct. Furthermore, they could have given the employees a month's notice, informed them that they did not have to report for duty during this time and pay them for the month. Menzies, after all, through their litigation strategies managed to hold on to their *de facto* monopoly for quite a long period.

- (b) That the JV did not have the staff or safety equipment to take over in such short period. This concern was none of their business. This was an issue that had to be resolved between the NAC, the JV and Civil Aviation Authorities and if the JV would have been unable to take over that would be a risk the NAC would have to address as it is their responsibility to see to it that airports under their jurisdiction are managed in accordance with the applicable standards. This would also be a breach of contract by the JV and the NAC would also be entitled to deal with it on this basis.
- (c) That there were other parties involved in the matter including seven regular airlines that were all entitled to reasonable notice. Once again this is none of Menzies' business. There is in any event no evidence that any of the airlines did not regard the notice to Menzies to vacate as not being reasonable as far as they were concerned.
- (d) Menzies called a meeting with the NAC to discuss the eviction judgment

subsequent to their appeal being dismissed but no agreement could be reached and the NAC stood by its notice to Menzies to vacate by 13 June 2023. This meeting, as it did not lead to an agreement as to when Menzies had to vacate the HKIA, is of no relevance to the determination of this appeal.

[62] What is clear is that Menzies never indicated what it thought a reasonable notice period to vacate HKIA would be. The court *a quo* determined this period would be 30 days. When the NAC gave Menzies 30 days, Menzies launched an application in the High Court to set this notice aside. In addition, in their notice of appeal in respect of the judgment of the court *a quo* they noted an appeal against the finding that a 30 day notice would be sufficient but indicated at the hearing that they are not proceeding with that ground of appeal as it forms part of the reasons and not the order and was hence not appealable. It was submitted that this Court should set that finding aside as an irregularity as it did not form part of the relief sought. It is clearly a tactical approach by Menzies to dispute virtually any notice to it that fell short of the one year benchmark they kept raising but not persisting with it in this Court.

[63] Menzies also relied on the fact that according to them they had an open and shut case in respect of the review application pending in the High Court and to allow the JV to continue rendering the ground handling services would be to enforce an invalid award to the JV. In view of this Court's decision in the appeal against the refusal of the interim interdict to allow Menzies to continue to render such services despite the fact that its contract expired where it also is *prima facie* disqualified from

rendering such services and where a final order of eviction had been granted against it would not serve real and substantial justice to stay the eviction order.

[64] As far as the other considerations are concerned when it comes to the stay of the writ of eviction discussed above, they simply do not pass the test. Menzies simply refused to state why they could not have started with the handover on 13 June 2023 and, if it was practically impossible to do a full handover and vacate by that date, why, eg could they not have allowed the JV to start with the checking-in of passengers and luggage on that date which would have been 10 hours after their last flight? Why could the clerks responsible for the check-ins aforesaid not vacate whatever premises they used and hand it over to NAC or the JV? There is no explanation as to how integrated their tasks were or why some tasks and actions could not be handed over virtually immediately and others only later. There is no explanation on how long it would take to remove their equipment and machinery from HKIA and if and why they could not stand idle elsewhere on the premises of HKIA pending their removal and allow the JV to bring their equipment and machinery on site so as to commence with the ground handling services. I accept that the nature of the operations that Menzies conducted included a freight warehouse and that it might not have been possible to remove their presence totally from HKIA within the time given in the notice by NAC but they do not explain this at all. In fact, the lack of details speaks to their *mala fides* in the bringing of the application. They did not come up with any details as to why it was not possible for them to adhere to the notice and according to them it was for NAC to establish that the notice was a reasonable one as on their say so it was not. They refused to even suggest what they would regard as reasonable notice as this

was, once again, according to them, for the NAC to establish. Menzies also does not provide a timetable as to what they would suggest a reasonable period would be to allow them a piecemeal vacation if this was the only feasible and practical manner to adhere to the eviction order. This latter information would only have been required if indeed Menzies was of the view that a multi stage vacation was the only option in respect of the eviction order which was of immediate effect.

[65] The fact of the matter is that Menzies provided the court *a quo* with no information that would be of use to it to decide whether to stay the warrant of execution and for how long. Menzies had to persuade the court *a quo* to grant the stay of the eviction order. Instead they brought an application on the basis that their mere say so with regard to the impossibility of immediate action in terms of the eviction order would entitle them to such a stay unless the NAC could establish that their notice period was reasonable. This was the wrong approach. It was for Menzies to persuade the court based on facts that it was impossible to give effect to the eviction order by 13 June 2023 and how long it would take them, having regard to what is feasible and practical in circumstances to give effect to the order. Without such information the court *a quo* simply had no basis to stay the execution of the writ of eviction for any period.

[66] It thus follows that the cross-appeal by the JV against the order *a quo* declaring that the notice given to Menzies to vacate was unreasonable and invalid must be upheld.

[67] As a result of the above finding, it is not necessary to deal with the application to review the 30 day notice period found by the court *a quo* to be reasonable period. It would make no difference to Menzies' case. In fact, it becomes irrelevant to the dispute between the parties. Menzies had to adhere to the eviction order of the High Court and the question of what would constitute the reasonable notice period is of no relevance. Menzies had to commence with the vacation of the HKIA from the date that the eviction order was confirmed by this Court. If it was impossible to do so within the time indicated for their vacation from the NAC they should have approached the High Court for a stay of execution and made out a case for a stay and the duration of such stay. This Menzies did not do for the reasons set out above and there is simply no purpose now for reviewing and setting aside the finding that 30 day notice would be reasonable where the basis for such finding has been stated to have been wrong.

Certification of personnel and equipment of the JV

[68] As I found that the notice to stakeholders did not amount to a new agreement by the NAC to give Menzies reasonable notice to terminate the ground handling agreement and as its appeal against the eviction judgment was unsuccessful, it follows that Menzies had to vacate HKIA by 13 June 2023 failing which it would face eviction as the eviction judgment still supported a writ of eviction. It further follows that the order sought by Menzies relating to the certification of the personnel and equipment of the JV must be dealt with as the reason for an order that the writ of eviction be suspended. This follows from the notice of motion which sought the suspension of the eviction order pending the finalisation of the disputes relating to the said certifications and this is what needs to be considered.

[69] In dealing with the question above I have assumed in favour of Menzies that the certification process was flawed. I have done this because I am of the view that, in the circumstances of this case the irregular and flawed processes alleged by Menzies would not entitle it to a stay of the writ of eviction. Firstly, it would not allow Menzies to continue to provide the ground handling services at HKIA as it had no agreement with the NAC in this regard. That was clearly the main reason for seeking the relief in furtherance of its primary objective, to remain on HKIA for as long as possible. Secondly, the JV is obliged to comply with the contract it had entered into with the NAC. It is therefore for the NAC to deal with any breaches of the contract with the JV in terms of the contractual terms governing the relationship between them. Thirdly, the Civil Aviation Authority has overall jurisdiction in respect of certain aspects relating to aviation safety and if breaches occurred, it must see to it that those issues are addressed by the NAC which is obliged to run HKIA in accordance with legislative and regulatory prescripts or by the JV who must also adhere to the statutory or regulatory requirements. Menzies does not make out any case why they are detrimentally affected by such breaches or that the legislative requirements are put in place for their benefit among others.¹⁰ Implicit in their approach is that pending the certification, Menzies would be able to continue to unlawfully act in accordance with the expired agreement it had with the NAC. Fourthly, in so far as the interest of Menzies is grounded in the public safety it, *prima facie*, seeks to enforce an *actio popularis* which has been obsolete in our law for more than a century.¹¹ Fifthly, the

¹⁰ *Patz v Greene & Co.* 1907 TS 427 at 433; *Director of Education, Transvaal v McCagie* 1918 AD 616 at 621; *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 726 and *C. D. of Birnam (Suburban) (Pty) Ltd v Falcon Investments Ltd* 1973 (3) SA 838 (W) at 846.

¹¹ See L Baxter *Administrative Law* (1984) at 665 (and the cases cited in footnote 141 therein).

attack on the certification is irrelevant to the determination and the relief sought in the pending review application. In short, whether the JV is adhering to their contractual provisions with the NAC or with their statutory duties is in my view an issue which does not justify the stay of the eviction order in the circumstances of the present matter.

[70] I am thus not convinced that this side issue to the primary litigation involving the parties would justify the suspension of the eviction order to ensure real and substantial justice between the parties and I accordingly agree with the conclusion of the court *a quo* that the basis for this relief was not established by Menzies.

Conclusion

[71] For the reasons set out above the appeal by Menzies against the order *a quo* refusing to grant the order relating to the certification issue stands to be dismissed and the cross-appeal by the JV against the order that the notice given by the NAC on 9 June 2023 to Menzies to vacate the premises of HKIA by 13 June 2023 was unreasonable is upheld. As Menzies was on the losing side in both the appeal and the cross-appeal it should be ordered to pay the costs in respect of both. As all of the parties made use of two instructed counsel at all times the costs to be paid by Menzies shall include the costs of one instructing and two instructed counsel.

[72] In the result, I make the following order:

1. The condonation application in respect of the late filing of the notice to oppose and the power of attorney of the second respondent is condoned.
2. The second respondent is to pay the costs of the said condonation application on a legal practitioner and client scale which costs shall include the costs of one instructing and two instructed counsel and shall include 15 per cent of the costs in respect of attendance and appearance at the hearing of the appeal. This costs order applies in favour of the appellant only.
3. The appeal by the appellant (Menzies) against the order made *a quo* to decline the relief sought relating to the certification of the personnel and equipment of the second respondent is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel. Such costs shall be limited in the case of the second respondent to 85 per cent of the costs in respect of attendance and appearance at the hearing of the appeal.
4. The cross-appeal by second respondent (the JV) against the order made *a quo* to the effect that the notice given by the NAC on 9 June 2023 to Menzies for the latter to vacate Hosea Kutako International Airport by 13 June 2023 was unreasonable and set aside succeeds with costs including the costs of one instructing and two instructed counsel. Such costs shall be

limited to 85 per cent of the costs in respect of the attendance and appearance at the hearing of the appeal.

5. The order of the High Court dated 8 August 2023 is set aside and substituted by the following order:

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

FRANK AJA

MAINGA JA

HOFF JA

APPEARANCES

APPELLANT: R Heathcote SC (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.