REPORTABLE

CASE NO: SA 52/2024

IN THE SUPREME COURT OF NAMIBIA

In the application between:

MENZIES AVIATION (NAMIBIA) (PTY) LIMITED	**Applicant**

and

NAMIBIA AIRPORTS COMPANY LIMITED	**Respondent**

In re:

The appeal between:

NAMIBIA AIRPORTS COMPANY LIMITED	**Appellant**

and

MENZIES AVIATION (NAMIBIA) (PTY) LIMITED	**First Respondent**
PARAGON INVESTMENT HOLDINGS (PTY) LTD	
JOINT VENTURE ETHIOPIAN AIRLINES	**Second Respondent**
SKYE 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: FRANK AJA

Heard: *In Chambers*

Delivered: 12 July 2024

Summary: This is an application in terms of s 14(7)*(a)* of the Supreme Court Act 15 of 1990 read with rule 6 of the Rules of the Supreme Court. In a bid to provide ground handling services at the Hosea Kutako International Airport, the Namibia Airports Company (the NAC) invited interested parties to bid for this tender. Paragon Investment Holdings (Pty) Ltd Joint Venture Ethiopian Airlines (the JV) was selected to render these services. The first respondent (Menzies), the incumbent ground handling service provider also entered a bid in reaction to the bid invitation. Menzies' bid was disqualified and after it unsuccessfully reviewed the award to the Review Panel, it instituted review proceedings in the High Court to have the award to the JV reviewed and set aside. After the award of the bid to the JV and subsequent to the unsuccessful approach to the Review Panel, Menzies indicated to the NAC that it would not vacate the airport at the end of their contractual term. This prompted the NAC to approach the High Court for an order that Menzies' contractual term would end on its termination date due to the effluxion of time and authorising it to evict Menzies should the latter not vacate the airport at that date. Menzies opposed the application on the following grounds: a tacit relocation of its ground handling service agreement and raised an issue relating to the competence of the NAC to adjudicate

the bids as the total value of the services exceeded the benchmark set for the NAC to deal with the matter and submitted that the bid evaluation had to be done by the Central Procurement Board of Namibia. Menzies also brought a counter-application for a temporary interdict to prevent the award being implemented pending the finalisation of a review application which it had instituted to review and set aside the award to the JV.

The High Court granted the relief sought by the NAC and dismissed Menzies' counter-application on the basis that Menzies did not cite the Chairperson of the Review Panel as a party. This resulted in Menzies noting an appeal to this Court (suspending the High Court's order). Menzies further launched an application seeking a temporary interdict to prevent the award from being implemented pending the then review application

NAC noted an appeal against the ruling of the court *a quo* in respect of 'the referral of the matter to hear oral evidence regarding the issues raised by (Menzies) in the case management report (. . .) as well as the costs order granted' which suspended the continuation of the review application.

Menzies brought an application in terms of rule 6(1) of the Rules of the Supreme Court read with s 14(7)*(a)*(i) of the Supreme Court Act 15 of 1990 for the summary dismissal of the appeal on the basis that it is 'frivolous and/or vexatious, annoying and enjoys no prospects of success'. Menzies correctly submitted with reference to *Elifas & others v Asino & others* 2020 (4) NR 1030 (SC), *Di Savino v Nedbank Namibia Limited* 2017 (3) NR 880 (SC) and other decisions of this Court that an order to refer issues in an application to oral evidence is a ruling which is not appealable. The NAC submitted that the Constitutional Court of South Africa has developed its jurisdiction to allow appeals in cases such as the present where 'the interest of justice so require' and that this Court should also follow this line of enquiry which will lead to the appeal noted in this matter being heard. NAC further submitted that the judge *a quo* 'rode

roughshod' through the discipline of motion proceedings as '(she) improperly applied the test for referral'.

Held that, this Court has in a number of decisions developed the criteria applicable to intended appeals to this Court and based on such decisions it is clear that rulings to refer issues arising in application matters to oral evidence are not appealable.

Held that, this Court (and the High Court) have the inherent jurisdiction to protect and regulate its own processes and to develop the common law so as to meet modern exigencies. As often put, unlike other public bodies and inferior courts which only have the powers bestowed on them, this Court may do anything that the law does not prohibit.

Held that, s 18 of the High Court Act 16 of 1990 provides for appeals to this Court in civil proceedings and are to the following effect: Where the High Court acts as a court of first instance an appeal against a judgment or order from that court, lies, as of right, to this Court except where the decision sought to be appealed relates solely to the costs order or where the order sought to be appealed against is an interlocutory order. Such interlocutory order or costs order cannot be appealed 'save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court'.

Held that, the amendments to the appeal process in South Africa of the Supreme Court Act 59 of 1959 in 1982 do not apply to Namibia. Where the Namibian Supreme Court has decided on an issue, that issue is final as far as Namibia is concerned irrespective of a contrary finding by any court in the world including the Constitutional Court of South Africa unless this Court in its inherent powers to develop the common law or keep pace with the modern world and to cater for modern exigencies revisits old authorities to modify their operation in certain circumstances.

Held that, the appellant's (NAC) attempt to advance compelling circumstances to warrant this Court to revisit the position relating to appeals as set out in *Elias* and *Di Savino* cannot be considered as this Court cannot exercise its inherent jurisdiction contrary to the provisions of s 18 of the High Court Act.

Held that, the ruling to refer certain issues to oral evidence is an interlocutory one. This means that it is not appealable without leave from the court *a quo* and if refused from this Court. This is the effect of s 18(3) of the High Court Act. The NAC disregarded this process.

Consequently, the appeal noted by the NAC is without any prospects. It was filed as of right and not in accordance with provisions of s 18(3) of the High Court Act 16 of 1990. It thus stands to be struck from the roll with costs on a legal practitioner and client scale which include the costs of one instructing and two instructed legal practitioners.

JUDGMENT PURSUANT TO SECTION 14(7)*(a)* OF THE SUPREME COURT ACT 15 OF 1990 READ WITH RULE 6(1) OF THE RULES OF THE SUPREME COURT

FRANK AJA

Introduction

[1] The appellant (NAC) invited bids from interested parties to provide ground handling services at the Hosea Kutako International Airport (HKIA). A number of bidders responded and the second respondent (the JV) was selected to render these services. First respondent (Menzies) was the incumbent ground handling service provider immediately prior to the award of the bid to the JV. Menzies also entered a bid in reaction to the invitation to bidders from the NAC. The bid of Menzies was disqualified and after an unsuccessful approach to the Review Panel (the eighth

respondent), it instituted review proceedings in the High Court to have the award to the JV reviewed and set aside.

[2] Shortly after the award of the bid to the JV and subsequent to the unsuccessful approach to the Review Panel, Menzies indicated that it would not vacate the airport at the end of their contractual term. The NAC approached the High Court for an order that Menzies' term would end on its termination date due to the effluxion of time and authorising it to evict Menzies should the latter not vacate the airport at that date. Menzies opposed this application primarily based on a tacit relocation of its ground handling service agreement. It also raised an issue relating to the competence of the NAC to adjudicate the bids as the total value of the services exceeded the benchmark set for the NAC to deal with the matter and submitted that the bid evaluation had to be done by the Central Procurement Board of Namibia. In a counter-application, a temporary interdict was sought to prevent the award being implemented pending the finalisation of a review application which by then had been instituted by Menzies to review and set aside the award to the JV.

[3] The High Court granted the relief sought by the NAC and dismissed the counter-application by Menzies on the basis that the Chairperson of the Review Panel was not cited as a party. Menzies noted an appeal against the judgment of the High Court. This appeal suspended the order of the High Court and quite soon thereafter Menzies launched a fresh application seeking a temporary interdict to prevent the award from being implemented pending the then pending review application. The three matters, ie the appeal, the review and the interim interdict proceedings thus

proceeded simultaneously. The application for the interim interdict was declined and shortly thereafter this Court dismissed the appeal against the judgment of the High Court that Menzies had to vacate the airport or be evicted. Menzies sought leave to appeal the refusal of the interim interdict which leave was granted. As the application for leave to appeal the refusal of the interim interdict did not suspend the execution of the order confirmed by this Court, the NAC gave Menzies notice to vacate the airport within days and Menzies launched an urgent application seeking a stay of the eviction order pending reasonable notice to vacate.[1] The stay pending reasonable notice was granted. Both the appeal against the refusal of the interim interdict and the stay of the eviction order ended up on appeal in this Court. In both appeals Menzies was on the losing side.

[4] In the meantime, the exchange of pleadings inclusive of disputes relating to the record of the proceedings sought to be reviewed had been finalised and the review was ripe for hearing on 20 February 2024. At this hearing an application was made on behalf of Menzies that certain issues be referred to oral evidence. This approach was contested on behalf of the NAC and the JV. The High Court however in a ruling dated 28 March 2024 referred the matter for the hearing of oral evidence with respect to 'the issues raised by the applicant (Menzies) in the case management report'.

[5] The NAC noted an appeal against the ruling of the court *a quo* in respect of 'the referral of the matter to have oral evidence regarding the issues raised by

[1] The stay was sought pending reasonable notice, alternatively pending this Court's judgment in the appeal against the eviction order issued by the trial court. As this appeal was unsuccessful this option fell by the wayside.

(Menzies) in the case management report (. . .) as well as the costs order granted'. The notice of appeal is very detailed and is set out in 18 pages.

Rule 6 application

[6] The notice of appeal suspends the continuation of the review application and it is directed at the order *a quo* referring certain issues to oral evidence. This referral was deemed necessary by the court *a quo* for the purpose of adjudicating the review application.

[7] Menzies in the current application seeks the summary dismissal of the noted appeal pursuant to rule 6(1) of the Rules of this Court on the basis that it is 'frivolous and/or vexatious, annoying and enjoys no prospects of success' together with a costs order on an 'attorney and client basis' inclusive of the 'costs of one instructing and two instructed counsel (where employed)'.

[8] To determine whether the appeal is to be summarily dismissed s 14(7)*(a)*(1) of the Supreme Court Act 15 of 1990 states that this can be done on the grounds mentioned above, namely '. . . on the grounds that it is frivolous or vexatious or otherwise has no prospects of success . . .'.

[9] From the criteria mentioned above, it is clear that there are three instances where an appeal can be summarily dismissed, namely where it is vexatious, where it is frivolous, and where it has no prospects of success. In the instances mentioned it

normally follows that the appeal has been instituted with improper motives, ie to annoy or harass the other party(ies) to the appeal or to delay the matter and the ultimate obviously detrimental outcome of the dispute.[2]

[10] In this application it is pointed out that this Court in *Elifas & others v Asino & others*[3] found that an order to refer issues in an application to oral evidence is a ruling which is not appealable at all.

[11] In *Elifas*, the court *a quo* granted leave to appeal a referral that a deponent in the application pending before that court appear before it to give oral evidence on some disputed matters.[4] Appellant sought to contend that 'the manner in which the judge *a quo* approached the matter rode roughshod through the discipline of motion proceedings as the court improperly applied the test for referral'.[5]

[12] This Court found that it was not bound by the fact that leave was granted and would not hear a matter, even if leave was granted, where such matter is not appealable.[6] The court then with reference to *Di Savino v Nedbank Ltd,*[7] s 18(3) of the High Court Act 16 of 1990 and *Knouwds NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea & another*[8] sets out the criteria

---

[2] *Temptations Fashion CC & another v J Henning Properties (Pty) Ltd & another* (SA 138/2023) [2024] NASC (1 March 2024) para 80.
[3] *Elifas & others v Asino & others* 2020 (4) NR 1030 (SC).
[4] *Elifas* at 1032A.
[5] *Elifas* at 1034B.
[6] *Elifas* at 1039E-F with reference to *Di Savino v Nedbank Ltd* 2017 (3) NR 880 (SC).
[7] *Di Savino v Nedbank Ltd* 2017 (3) NR 880 (SC) para 51.
[8] *Knouwds NO (in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd) v Josea & another* 2010 (2) NR 754 (SC) para 10.

established by this Court to determine whether a matter is appealable or appealable with leave or appealable as of right.

[13] Lastly, this Court, then referred to the South African decisions in *Wallach v Lew Geffen Estates CC;*[9] *President of the Republic of South Africa & others v South African Rugby Football Union & others*[10] and more importantly to the decision of this Court in *Aussenkehr Farms (Pty) Ltd & another v Minister of Mines and Energy & another*[11] which all are to the effect that a referral to evidence in application proceedings amounts to a ruling which is not appealable. The *ratio* for this finding in *Aussenkehr* was with reference to *Lubambo v Presbyterian Church of Africa*[12] in which case the position was stated as follows:

> 'Jansen J came to the conclusion that such ruling or order is analogous to an order giving a direction with regard to evidence or referring a matter to trial and was therefore not appealable, not even with leave.'

[14] In *Elifas*, this Court concluded as follows on this aspect:

> '[18] The impugned ruling related to a matter of procedure. The merits would be decided only after the oral evidence was received. The ruling did not have the effect of disposing of substantial issue between the parties and was therefore not appealable. The High Court was therefore not competent to grant leave to appeal. That order is for that reason of no force and effect.'

The appeal was thus struck from the roll, with costs.

---

[9] *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262J-263G.
[10] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC).
[11] *Aussenkehr Farms (Pty) Ltd & another v Minister of Mines and Energy & another* 2005 NR 21 (SC) at 29.
[12] *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE).

[15] What is clear from the foregoing analysis is that this Court has in a number of decisions, which I refer to above and dating from 2003[13] to 2020[14] developed the criteria applicable to intended appeals to this Court and based on such decisions, it is clear that rulings to refer issues arising in application matters to oral evidence are not appealable.

[16] On behalf of the NAC the submission boils down to the following: The Constitutional Court in South Africa has developed its jurisdiction to allow appeals in cases such as the present where 'the interest of justice so require' and that this Court should also follow this line of enquiry which will lead to the appeal noted in this matter being heard. They then fossick in the judgment *a quo* for grounds to submit, as did counsel in *Elifas,* that, in essence, the judge *a quo* 'rode roughshod' through the discipline of motion proceedings as (she) improperly applied the test for referral.

[17] This Court (and the High Court) have the inherent jurisdiction to protect and regulate its own processes and to develop the common law so as to meet modern exigencies. As often put, unlike other public bodies and inferior courts which only have the powers bestowed on them, this Court may do anything that the law does not prohibit.[15] In terms of Art 79(2) this Court is the apex Court in respect of all appeals emanating from the High Court including appeals 'which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and

[13] *Aussenkehr* at 21 indicating that judgment was handed down in March 2003.
[14] *Elifas* at 1036 indicating the judgment was handed down in October 2020.
[15] Article 78(4) of the Namibian Constitution.

freedoms guaranteed thereunder'. I should note in passing that the Namibian Constitution provides for direct access to this Court by the Attorney-General in certain circumstances in terms of Art 79(2). Acts of Parliament now also make provision for direct access to this Court. An example of this is the procedure contained in s 16 of the Supreme Court Act 15 of 1990 relating to the review jurisdiction of this Court. Lastly, in respect of the provisions of the Constitution relating to the workings of this Court reference is made to Art 79(4) which provides as follows:

> 'The jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament.'

[18] The relevant Act in respect of this Court as envisaged in the Namibian Constitution with respect to appeals to this Court from the High Court is the High Court Act 16 of 1990. Section 18 of the High Court Act provides for appeals to this Court in civil proceedings and are to the following effect: Where the High Court acts as a court of first instance an appeal against a judgment or order from that court, lies, as of right, to this Court except where the decision sought to be appealed relates solely to the costs order or where the order sought to be appealed against is an interlocutory order. Such interlocutory order or costs orders cannot be appealed 'save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court'.[16]

[19] It must be borne in mind that the Namibian High Court Act 16 of 1990 was modelled on the then provisions of the Supreme Court Act 59 of 1959 applicable in

[16] Section 18(3) of the High Court Act 16 of 1990.

South Africa up to about 1982 prior to the major amendments to that Act in that country and which Act (without the amendments referred to and made in South Africa) also applied in this country prior to the promulgation of Act 16 of 1990. This explains the references to South African authorities in the cases mentioned above relating to the findings and reasoning of Namibian Courts in respect of appealability or otherwise of rulings and orders. What is clear is that the situation in South Africa has changed substantially in the meantime. A Constitutional Court has been established with its own powers and rules and laws relating to appeals in that country from the High Courts to a newly established Supreme Court of Appeal and approaches and appeals to the Constitutional Court also being established.

[20] As the changes mentioned above obviously do not apply to Namibia I am not *au fait* with any details of the rules or legislative instruments put in place in that country relating to the criteria of what matters are appealable, how the process regulating appeals functions and the power of South African courts hearing such appeals. One, of course, gains information of some of these matters where South African cases are referred to in this Court but this is by necessity partial and incomplete. It is necessary I again state the obvious. This Court is the apex court in this country and it is not bound by a decision of any court in any country on any issue. Where the Namibian Supreme Court has decided an issue that issue is final as far as Namibia is concerned irrespective of a contrary finding by any court in the world including the Constitutional Court of a former colonial power.

[21] Despite the finality of its decisions, this Court may in its inherent powers to develop the common law to keep pace with the modern world and to cater for modern

exigencies, revisit old authorities to modify their operation in certain circumstances. It is not necessary for the purpose of this judgment to attempt to state the circumstances or principles applicable when such exercise will be undertaken. The mere fact that the South African Constitutional Court has done this, seemingly by virtue of s 173 of their Constitution which provides that it has 'the inherent power to protect and regulate (its) own process and to develop the common law, taking into account the interest of justice' does not mean this Court must or will necessarily follow in their footsteps. As pointed out by this Court one must be slow to apply foreign case law, especially where they operate under different legislation and with a different constitution to us. I have already referred to the creation of the Constitutional Court which has no equivalent in Namibia where this Court is the apex court irrespective of the nature of the dispute. When it comes to appeals in South Africa it appears to me that the current legislation in that country cannot anymore be safely regarded as similar to the legislation in this country. *Herbstein and Van Winsen: The Civil Practice of the High Court in South Africa*[17] states the position as follows:

> 'In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[18] the Appellate Division dealt extensively with the scope and effect of amendments to the Supreme Court Act introduced by the Appeals Amendment Act, 1982. The substituted section 20, read with the amended section 21, has introduced an entirely new dispensation regarding appeals from a judgment or order of a provincial or local division in civil proceedings.'

I point out that the reference to 'provincial or local division' will in current terminology be a reference to the High Courts in South Africa.

---

[17] 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 2 at 1120-1121.
[18] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A).

[22] In *Attorney-General of Namibia v Minister of Justice & others*,[19] this Court dealt with the referral to South African cases in Constitutional matters as follows:

> '. . . while South African and other jurisdictions' precedents may be persuasive authority for our courts under given circumstances, it is worth observing that after our country's Independence, Namibian courts have developed a reservoir of distinctly Namibian jurisprudence based on the constitution and Namibian law. Decisions of foreign courts that are found to be persuasive due to the similarity of applicable principles, provisions, issues and other circumstances relevant to matters at hand may, of course, be followed by our courts on principle rather than precedent. As far as reliance on South African authorities in the interpretation of constitutional provisions is concerned, it should be borne in mind that there are differences between the wording of certain provisions of the Constitution and the corresponding provisions in the South African Constitution. Our courts have rightly held that South African case law is not to be followed where there are material differences between the provisions in the respective constitutions.'[20]

[23] Although the comments quoted above deal with constitutional issues it is equally apposite to matters other than constitutional ones and as pointed out above, subsequent to the amendments to the appeal process in the South African Act in 1982 the legal positions in South Africa and Namibia differ *toto coeli*. Furthermore, the position relating to appeals has been fully and comprehensively dealt with by this Court in *Di Savino* and *Elifas* and the conclusion reached based on the Namibian constitutional and legislative framework is that referrals to evidence in application proceedings are not appealable. I can think of no compelling reasons why this approach should be revisited after being established a mere four years ago. I do not

[19] *Attorney-General of Namibia v Minister of Justice & others* 2013 (3) NR 806 (SC).
[20] *Ibid* para 8.

consider whether the appellant has advanced any compelling circumstances that this principle needs to be revisited. I am of the view that I am precluded from dealing with the considerations put up on behalf of the appellant to justify a departure from *Elifas* for the reasons set out below.

[24] It is common cause that the ruling to refer certain issues to oral evidence is an interlocutory one, and correctly so. This means that it is not appealable without leave from the court *a quo* and if refused from this Court. This is the effect of s 18(3) of the High Court Act referred to above. As pointed out above this Court cannot, as part of its inherent jurisdiction assume jurisdiction contrary to existing legislation including the High Court Act. This process was disregarded by the appellant.

[25] Appellant should have sought leave *a quo* on the basis that there were compelling circumstances present in this matter, and identifying them to justify why *Elifas* does not apply to them. If this leave was refused, an approach should have been made to this Court to grant leave to appeal. If leave was granted, this Court would have to decide whether there was any basis to revisit *Elifas* and deal with the issue raised. The point is that neither I nor this Court can exercise jurisdiction in respect of the appeal noted in this matter as it was noted contrary to the express provisions of s 18(3) of the High Court Act.

Conclusion

[26] It follows from what is stated above that the current appeal noted is without any prospects as it was filed as of right and not in accordance with provisions of s 18(3) of the High Court Act 16 of 1990 and hence will have to be struck from the roll.

[27] On behalf of Menzies it is submitted that the costs order should be on a legal practitioner and client scale inclusive of the costs of one instructing and two instructed legal practitioners.

[28] The appeal noted, so it is submitted, was simply a strategy to delay the review application which would allow the JV, who is the NAC's preferred ground handler, to continue to deliver these services. It seems that both the NAC and the JV submitted in the High Court that the dates for the hearing of the oral evidence would have to wait as that order has been suspended by the noting of this appeal.

[29] The NAC submits that the request for the referral to oral evidence by Menzies was simply a further step in their stratagem, in this litigation against the NAC which this Court described as a 'tyranny of litigation'. This submission is totally misplaced. This Court used the phrase in the context of a litigation strategy engaged by Menzies to not yield their *de facto* monopoly and to continue rendering the ground handling services despite the fact that their agreement with the NAC in this regard had expired. This strategy was to retain possession of the premises at HKIA pending the review application they instituted against the award of the contract to the JV and not to them. This strategy came to an end upon eviction from the HKIA with the JV taking over the ground handling services at the airport. There was not a single reference related to

the tyranny of litigation in respect of the review application instituted by Menzies. In fact, they were so gung-ho about their prospects of success in respect of the review application that they were at all times keen that it be finalised. It is the NAC (and the JV) who can benefit from further delays in the process as this would mean the preferred bidder (the JV) of the NAC would be entitled to render the ground handling services for a longer period should the review succeed. It is difficult to fathom why the NAC opposes the hearing of oral evidence as it will, on their version, vindicate them and even if not, will lead to the earlier finalisation of the review which will create certainty for all parties moving forward. There is thus something to be said for the submission on behalf of Menzies that the appeal noted was motivated by the delay it would cause to the review.

[30] In addition, when considering this aspect, the legal practitioners for NAC must have become aware of *Elifas* and the case law referred in *Elifas* which included a number of South African authorities dealing with matters when the South African law was closely aligned with the current High Court Act of Namibia. It does seem likely that when the legal practitioners discovered that the South African Constitutional Court took a different approach, they saw an opportunity to question the position taken in *Elifas.* Whether they had knowledge of the approach of the Constitutional Court of South Africa when they filed their notice of appeal or whether they discovered the South African case only subsequent to the filing of this rule 6 application, I cannot say. Be that as it may, *Elifas* should have made them more circumspect in their approach in the intended appeal and they should have in any event, realised that irrespective of their view as to the correctness or not of *Elifas* that

it was a final judgment which would not simply be disturbed and that what they sought to appeal was an interlocutory ruling for which they needed leave. That latter approach would, of course, not necessarily serve their purpose to delay the review matter because an application for leave to appeal would not suspend the order for referral nor would they have to face the unlikelihood of the court *a quo* not holding itself bound by *Elifas*. The safest course for the delay tactic was to simply file a notice of appeal so that the NAC could contend while the 'appeal' was in the process at the Supreme Court that the referral order has been suspended pending the finalisation of the 'appeal'.

[31] I am satisfied that in view of the circumstances set out above that the appeal was noted simply to harass or annoy Menzies and that a special costs order is warranted against the NAC.

[32] It follows that the appeal must be struck from the roll with costs on a legal practitioner and client scale which should include the costs of one instructing and two instructed legal practitioners and I do so order.

_____

FRANK AJA

REPRESENTATION

APPELLANT/RESPONDENT:	T Bruinders SC (with him U A Hengari) Instructed by Shikongo Law Chambers
FIRST RESPONDENT/APPLICANT:	R Heathcote SC (with him J P Ravenscroft-Jones) Instructed by Viljoen, Viljoen & Vennote (Partners)