

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2023/00376

In the matter between:

MENZIES AVIATION (NAMIBIA) (PTY) LTD

APPLICANT

and

NAMIBIA AIRPORTS COMPANY LIMITED

1st RESPONDENT

PARAGON INVESTMENT HOLDINGS (PTY) LTD

JV ETHIOPIAN AIRLINES

2nd RESPONDENT

DEPUTY SHERIFF FOR THE DISTRICT OF WINDHOEK

3rd RESPONDENT

MINISTER OF SAFETY AND SECURITY

4th RESPONDENT

NAMIBIA CIVIL AVIATION AUTHORITY

5th RESPONDENT

INSPECTOR GENERAL OF THE NAMIBIAN POLICE

6th RESPONDENT

Neutral Citation: *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Limited* (HC-MD-CIV-MOT-GEN-2023/00376) [2023] NAHCMD 540 (1 September 2023)

Coram: PRINSLOO J

Heard: 19 August 2023

Delivered: 01 September 2023

Flynote: Civil Procedure – Application for *mandament van spolie* – Requirements discussed.

Summary: The applicant in this matter launched an urgent application seeking, amongst other things, a spoliation order against the respondents. In its notice of motion, the applicant more specifically seeks the following relief: That the first and/or second and/or third and/or fourth and/or fifth and/or sixth respondents is (are) ordered to restore possession / part-possession, *ante omnia*, to the applicant of the HKIA, and more particularly, but not limiting the generality of the order, in respect of those portions described in paragraph 40 of the founding affidavit. The Namibian Airports Company, Paragon and the Namibian Police oppose the application.

Held that Menzies was in de facto possession or part possession of HKIA.

Held further that the first requirement of *mandament van spolie* does not require Menzies to have a legal right to possess the property. The cause of Menzies' possession is irrelevant for purposes of the current enquiry. It is likewise irrelevant whether NAC has a stronger right or claim to possession, such as ownership. The *mandament van spolie* protects only physical possession and not the right to possession.

Held further that it is the function of the Supreme Court to decide if the cross-appeal by Paragon is a nullity or not. It is not for this court to determine this issue.

Held further that there was nothing untoward in the manner in which service of the cross-appeal was effected by Paragon.

Held further that the only extant judgments are that of Sibeya J and the judgment of the Supreme Court in light of the appeals in respect of Rakow J and Ueitele J's judgments,

which suspended the execution of those orders. Resultantly, the judgment and orders of Justice Ueitele for the purpose of this application have no operative effect.

Held further that the Deputy Sheriff acted in terms of a court order issued by this court, which falls within the exceptions that can successfully be raised as a defence against an application for mandament van spolie.

Held further that from the time of the filing of the cross-appeal and onwards, the order of Sibeya J was operative, and Menzies was under no legal obligation to provide and similarly had no legal right to insist on providing ground handling services at HKIA. Consequently, Menzies had no legal right to continue to occupy any premises at HKIA (which was incidental to its obligation to provide ground handling services during the duration of the agreement and the noted appeal).

Held further that the NAC was entitled to enforce the extant Sibeya judgment of 29 June 2022 and the Supreme Court judgment of 9 June 2023, and Menzies failed to discharge its onus regarding the second requirement of mandament van spolie.

Held further that the application is dismissed with costs.

ORDER

1. The application is dismissed with costs.
2. The applicant is ordered to pay the costs as follows:
 - a. In respect of the first respondent, such costs consequent upon the employment of one instructing and two instructed counsel;
 - b. In respect of the second respondent, cost of three legal practitioners;

c. In respect of the fourth and sixth respondents, such costs consequent upon the employment of one instructing and one instructed counsel.

3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

PRINSLOO J:

Introduction

[1] This matter came before me on an urgent basis on the morning of 19 August 2023 to mark yet another chapter in the litigation battle between the applicant, Menzies Aviation (Namibia) (Pty) Ltd (Menzies), the Namibia Airports Company Limited (NAC) as the first respondent and Paragon Investment Holdings (Pty) Ltd JV Ethiopian Airlines (Paragon) as the second respondent.

[2] Added to the respondents this time around are:

- a) The Deputy Sheriff for the District of Windhoek, as the third respondent;
- b) The Minister of Safety and Security, the Line Minister responsible for the Namibian Police, as the fourth respondent;
- c) The Namibian Civil Aviation Authority, as the fifth respondent; and
- d) The Inspector-General of the Namibian Police as the sixth respondent.

The application

[3] Menzies sought the following relief:

'1. The applicant's non-compliance with the prescribed periods of time and forms of service, is hereby condoned, including its non-compliance with the Practice Directive that urgent applications must be set down at 09h00, and the matter is enrolled as one of urgency in terms of Rule 73(3) of the rules of this court.

2. That a *rule nisi* be issued calling upon the respondents to show cause on a date to be determined by the court why an order in the following terms should not be issued;

2.1 That the First and/or Second and/or Third and/or Fourth and/or Fifth and/or Sixth respondents is (are) ordered to restore possession / part-possession, *ante omnia*, to the Applicant of the HKIA, and more particularly, but not limiting the generality of the order, in respect of those portions described in paragraph 40 and the founding affidavit, and particularly;

2.1.1. Motor vehicle parking bays described as parking bays numbers 75 and 76, not depicted on "A" below, but on the airport premises;

2.1.2. Open space (paved equipment area) consisting of 429 square metres, depicted on "A" as number 1;

2.1.3. Open space (equipment area) consisting of 1500 square metres, depicted on "A" as number 2; and 2.1.4. Antenna area, depicted on "A" as number 3 (on top of the roof of the terminal building); 2.1.5. Restroom and passenger services offices numbers 46 and 47, depicted on "A" as numbers 4 and 5;

2.1.6. Office number 28, depicted on "A" as number 6;

2.1.7. Office number 29, depicted on "A" as number 7;

2.1.8. Check in counters in the main terminal building, depicted on "A" as numbers 8-11;

2.2. Why the respondents or any one of them should not be ordered to pay the costs of the application on an attorney and own client scale;

2.3. That the relief set out in para 2.1 above shall become operative with immediate effect, pending the return date determined by the honourable court.'

[4] The NAC, Paragon and the Namibian Police opposed Menzies' application.

Background

[5] Menzies, the NAC and Paragon are the main protagonists in this litigation history. As intimated earlier, the current application is just one of many. Several judgments were released by our courts, including the Supreme Court, which discussed the history of the litigation between the parties.

[6] I will, therefore, deal with the events that gave rise to the current application and to do so, it is necessary to deal with the chronology of events.

[7] Menzies had been appointed to render ground handling services at Hosea Kutako International Airport (HKIA) from 1 January 2014 to 31 December 2018. However, due to a renewal of the contract up to 31 December 2021 and a further six-month extension, the contract was due to end on 30 June 2022.

[8] The licence for the ground handling services at HKIA came up for renewal in 2021. On 13 December 2021, Paragon was declared the successful bidder in terms of s 55 of the Public Procurement Act 15 of 2015 (the PPA) pursuant to a bidding process in terms of the said Act. Menzies sought to review this decision in terms of s 59 of the PPA. The Review Panel ruled against Menzies. Aggrieved by this, Menzies instituted review proceedings in the High Court on 8 April 2022 against the decision of the Review Panel. The review application is serving before Rakow J and is scheduled for hearing on 1 December 2023.¹

[9] On 1 July 2022, the new service provider, Paragon, was due to commence rendering the ground handling services at HKIA.

[10] On 21 June 2022, the NAC approached this court on an urgent basis to, inter alia, obtain an order directing that the agreement entered into between the NAC and Menzies shall terminate on 30 June 2022 and sought a declarator declaring that Menzies shall be

¹ *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-REV-2022/00155).

obliged on 30 June 2022 to cease providing all services at HKIA and to vacate the premises of HKIA.

[11] This application was vehemently opposed by Menzies, who also filed a counter-application. However, Sibeya J made the following order on 29 June 2022 (the Sibeya judgment):²

'1 ...

2. It is declared that the agreement entered into between the applicant and the first respondent for the first respondent to provide ground handling services at Hosea Kutako International Airport ("HKIA") shall terminate on 30 June 2022 ("the termination date").

3. It is declared that the first respondent shall, at the end of the day on the termination date:

3.1 cease to provide ground handling services at HKIA;

3.2 hand over all security access cards or other equipment entitling it to access HKIA or any premises which it occupies at HKIA by virtue of the ground handling services agreement with the applicant;

3.3 vacate occupation of any premises at HKIA occupied by virtue of the ground handling services agreement.

4. If the first respondent refuses to give effect to the order set out in paragraph 3 above, then the Deputy Sheriff of this Court is directed to:

4.1 evict the first respondent from HKIA and from all premises of HKIA occupied by the first respondent by virtue of the ground handling services agreement;

4.2 remove all equipment belonging to the first respondent from the HKIA.

² *Namibia Airports Company Limited v Menzies Aviation Namibia (Pty) Ltd and Another* (HC-MD-CIV-MOT-GEN-2022/00233) [2022] NAHCMD 403 (11 August 2022).

5. The order that the first respondent's counter-application is dismissed is varied in terms of rule 103(1) to read that the first respondent's counter-application is struck from the roll.

6. ...

7. ...

[12] On 30 June 2022, Menzies noted an appeal against the judgment of Sibeya J. The appeal was argued before the Supreme Court on 19 April 2023, and judgment was delivered on 9 June 2023, dismissing Menzies' appeal lodged against the eviction order of Sibeya J.

[13] In the interim, a further application served before Rakow J on 24 April 2023 in the wake of the review filed on 8 April 2022. The application before Rakow J consisted of two applications that were heard simultaneously. The first was an application to present new evidence in the pending review matter, in that Menzies wanted to supplement its founding papers, and the second was an application for a *pendente lite* interdict. In the latter application, Menzies sought an order interdicting the NAC from:

a) Implementing the award, or any contract between the NAC and Paragon pending the final determination of Menzies' review and pending the outcome of its appeal in the Supreme Court, and/or

b) Terminating the agreement entered into between Menzies and the NAC, which came about as a result of Menzies' appointment by the NAC in a unilateral notice to the NAC's stakeholders dated 30 June 2022, declaring that Menzies would continue its service delivery until further notice (or unless the NAC has given Menzies 12 months' notice). Alternatively, the 12 months' notice period is to run from the moment the NAC succeeds in setting aside the decision to appoint Menzies as per its letter dated 30 June 2022.

[14] To place the relief sought in para b) above into context, it is necessary to mention that when Menzies filed its appeal in respect of Sibeya J's judgment on 30 June 2022, the NAC, on the same date, issued a notice to its stakeholders, which reads as follows:

'30 June 2022

NOTICE TO STAKEHOLDERS

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.

Yours faithfully,

Leonard N. Shipuata
Executive: Airport Operations'

[15] Rakow J delivered judgment on 23 May 2023, dismissing the *pendente lite* application.³ This dismissal was also since appealed.

[16] On 9 June 2023, the Supreme Court dismissed Menzies' appeal against Sibeya J's judgment and its application to adduce further evidence, resulting in the NAC giving notice to Menzies to vacate HKIA within four days.

[17] Menzies contended that the notice was unreasonably short and launched an urgent application in the High Court to prevent the NAC from implementing its notice.

³ *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-REV-2022/00155) [2023] NAHCMD 281 (23 May 2023).

[18] This urgent application was initially heard on 12 June 2023 at 18h00 before Ueitele J. However, due to specific points in limine that were raised, the entire application was only heard on 4 July 2023.

[19] On the evening of 7 August 2023, Menzies launched a further urgent application, wherein it sought to adduce new evidence before the delivery of the judgment of Ueitele J scheduled for 8 August 2023. This interlocutory application was opposed by the NAC and Paragon and was dismissed on 8 August 2023.⁴

[20] In his judgment delivered on 8 August 2023,⁵ Ueitele J ordered, amongst other things, as follows (the Ueitele judgment):

‘1. It is declared that the notice which the Namibia Airports Company Limited on 9 June 2023, gave to Menzies Aviation (Namibia) (Pty) Ltd to cease the rendering of the ground handling services and vacate the Hosea Kutako International Airport was not reasonable and is thus invalid.

2. The notice of 9 June 2023, referred to in paragraph 1 of this Order is set aside.

3. The prayer to stay the execution of this court’s order issued under case HC-MD-CIV-MOT-GEN-2022/00233 pending the outcome of the review application under case HC-MD-CIV-MOT-REV-2022/00155 is dismissed.

4. The prayer to stay the execution of this court’s order issued under case HC-MD-CIV-MOT-GEN-2022/00233 pending the determination of the Menzies appeal in the Supreme Court from case HC-MD-CIV-MOT-REV-2022/00155 / INT-HC-OTH-2022/00331 is dismissed.

5. The prayer to set aside the certifications by the fourteenth and/or fifteenth and/or sixteenth respondent, of Paragon’s staff and equipment, as fit for purpose, to comply with the contract

⁴ *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Limited* (INT-HC-OTH-2023/00293).

⁵ *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Limited* (HC-MD-CIV-MOT-GEN-2023/00256) [2023] NAHCMD 485 (8 August 2023).

entered into between the Namibia Airports Company Limited and Paragon to provide ground handling services at Hosea Kutako International Airport, is dismissed.

6. Each party must pay its own costs.'

[21] Having considered the judgment of Ueitele J, the NAC issued a notice to Menzies on 9 August 2023 to vacate HKIA on or before 10 September 2023, giving them a 30 day period to vacate, which was consistent with para 33 of the judgment of 8 August 2023. However, Menzies noted in return correspondence inter alia that it would not accept the notice and insisted that it is entitled to 12 months' notice in terms of the Rent Ordinance 13 of 1977.

[22] On 10 August 2023, Menzies appealed a portion of the judgment of Ueitele J. Paragon also proceeded to file a cross-appeal on 18 August 2023 in respect of paras 1, 2 and 6 of Justice Ueitele's order.

The events of 19 August 2023

[23] It appears from the NAC's papers that it accepted that the filing of the cross-appeal by Paragon meant that the *status quo ante* reverted to what it was on 9 June 2023 when the Supreme Court upheld Sibeya J's judgment. Mr Gerson /Uirab, the Chief Executive Officer of the NAC, stated in the NAC's answering affidavit that there was, therefore, nothing preventing the enforcement of the Supreme Court judgment, i.e. Paragon had to take over the ground handling services in terms of the award made in its favour on 13 December 2021 and the ground handling service agreement entered into on 9 February 2022.

[24] As a result, Paragon commenced with the ground handling services in the early hours of 19 August 2023. When the staff members of Menzies arrived at HKIA at around 03h00, they could not access the premises as the busses transporting the staff members were prohibited from entering the airport's main gate.

[25] When Mr Emil Smith, Menzies' station manager and Mr Viljoen, Menzies' legal representative, arrived at the main gate of HKIA, they were prohibited from entering the premises by the Deputy Sheriff. Upon requesting the authority to prevent Menzies' staff from entering HKIA, the Deputy Sheriff produced to Mr Viljoen the Sibeya judgment and the Supreme Court judgment.

[26] The refusal by the Deputy Sheriff to allow Menzies' staff members onto the premises of HKIA gave rise to the current urgent application.

[27] Menzies avers in its papers that it was, at all relevant times, in peaceful and undisturbed possession or part possession of HKIA, specifically those parts of HKIA set out in its notice of motion.

[28] Mr Smith, the deponent to the founding affidavit on behalf of Menzies, avers that the 'old' judgments in the possession of the Deputy Sheriff were not applicable due to the findings made by Ueitele J. He contended that the NAC could not rely on the judgment and orders of Sibeya J, as confirmed by the Supreme Court, to evict Menzies from HKIA because Menzies is not rendering the ground handling services in terms of the agreement that Sibeya J held was terminated on 30 June 2022. He further contended that Menzies is rendering services in terms of the NAC's notice of 30 June 2022 to the stakeholders, which agreement arose after the Sibeya judgment.

[29] According to Mr Smith, the practical effect of the Ueitele judgment is that the NAC had to give Menzies a new notice to terminate the 'new agreement' in terms of which Menzies was rendering ground handling services at HKIA.

[30] Mr Smith further submitted that the respondents acted in cahoots and had unlawfully dispossessed Menzies of those areas at HKIA, which it had undisturbed possession of. In support of this contention, Mr Smith stated that the respondent(s) (presumably the NAC) had no power to dispossess Menzies. Its actions were unlawful and contrary to the 30 days' notice issued on 9 August 2023, which constituted an

acceptance of Ueitele J's judgment and a waiver of any right that may have existed in respect of the Sibeya and Supreme Court judgments.

Issues for determination

[31] The issues to be decided in this urgent application are, therefore, the following:

- (1) Whether the matter is urgent?
- (2) Whether Menzies had possession of HKIA when its staff members were denied access to those areas of HKIA as set out in the notice of motion and;
- (3) In the event Menzies had such possession, whether the NAC's conduct was unlawful.

Urgency

[32] Although the respondents contended in their papers that the application is not urgent, it is not a point argued with any form of conviction.

[33] The accepted position in our jurisdiction is that an application for spoliation is urgent by its very nature and that the overriding objective is to prevent self-help.⁶

[34] In my view the applicant has made out a case that the application is urgent.

⁶ See *Mark Thomas Wylie v Greg Villiger and 3 Others* Case Number A42/2012 delivered on 13 February 2013, *JJF Investment CC v Mouton* (HC-MD-CIV-MOT-GEN-2017/00048) [2017] NAHCMD 109 (5 April 2017) at para 25; *Rehoboth Properties CC v The Permanent Secretary of the National Planning Commission* (HC-MD-CIV-MOT-GEN-2017/00090) [2017] NAHCMD 132 (3 May 2017) at para 22.

Spoliation

[35] In *Yeko v Qana*,⁷ the court held that the spoliation remedy is available to any despoiled person who exercises physical control over the property with the intention of deriving some benefit therefrom. Possession is the most important element. Possession suffices if the holding was with the intention of securing some benefit for the applicant. It is actual physical possession that is protected and not 'the right' to possession. The applicant bears the onus of demonstrating effective physical control over the property.

[36] In *Tulela Processing Solutions (Pty) Ltd v Southern Africa Railways CC*⁸ Masuku J stated the following:

[33] In this regard, the court must be astute and not entangle itself with answering the merits of the dispute. In this regard, the following instructive remarks appear from *Fredericks and Another v Stellenbosch Divisional Council*:⁹

"The law is quite clear. Where a litigant seeks a spoliation order, a *mandament van spolie*, the court will not concern itself with the merits of the dispute . . . it matters not whether the applicant acquired possession secretly or even fraudulently."

[37] Thus, a court hearing a spoliation application does not require proof of an applicant's existing right to property, as opposed to his or her possession, to grant relief. But what needs to be stressed is that the mandament remedy provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. A spoliation order is thus no more than a precursor to an action over the merits of the dispute.¹⁰

⁷ *Yeko v Qana* 1973 (4) SA 735 (A) at 739H – 740A.

⁸ *Tulela Processing Solutions (Pty) Ltd v Southern Africa Railways CC* (HC-MD-CIV-MOT-GEN-EXP-00100/2021) [2021] NAHCMD 209 (6 May 2021).

⁹ *Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C).

¹⁰ *Eskom Holdings SOC Limited v Masinde* 2019 (5) SA 386 (SCA) at para 8.

[38] For mandament van spolie to apply, there are two requirements that the applicant must satisfy:

- a) The applicant must allege and prove that it had undisturbed and peaceful possession of the property and;
- b) The applicant must allege and prove unlawful deprivation of possession by the respondent(s), meaning it was done without consent, a court order or authorising legislation.

Discussion

Was the applicant in peaceful and undisturbed possession?

[39] In *Ness and Another v Greef*,¹¹ Viviers J stated that the words 'peaceful and undisturbed possession' probably means sufficiently stable or durable possession for the law to take cognisance of it.

[40] On behalf of the NAC, it was denied that Menzies was in peaceful and undisturbed possession or part possession of HKIA, as Menzies' occupation of the HKIA premises was predicated on an agreement which required it to provide ground handling services at HKIA. The NAC, however, maintains that the service agreement lapsed due to the effluxion of time on 30 June 2022.

[41] Mr /Uirab averred that the notice to the stakeholders dated 30 June 2022 did not identify a specific portion of the property that Menzies had a right to use exclusively. Mr /Uirab further stated that the purported agreement relied on by Menzies does not a) identify a specific portion of the property, b) specify that the property is for Menzies' exclusive and undisturbed use and enjoyment, and c) provide for a lease period. Mr

¹¹ *Ness and Another v Greef* 1985 (4) SA 641 (C) at 647D.

/Uirab, however, conceded that to fulfil its contractual obligations regarding rendering ground handling services, Menzies had to be stationed at HKIA.

[42] It can be said that it is debatable whether Menzies was in peaceful and undisturbed possession or possession of part of HKIA as a result of the multitude of applications brought before our courts to retain control over HKIA's ground handling business. However, the frequency of applications in this court is not the test against which to measure peaceful and undisturbed possession. I believe that the fact that the airport was up to 18 August 2023 business as usual with arriving and departing flights would evince that Menzies was occupying parts of HKIA to conduct the ground handling business. It would, therefore, appear that Menzies was in de facto possession or part possession of HKIA.

[43] The NAC contended, and did so repeatedly, that Menzies was in unlawful possession of areas and grounds at HKIA it claims to have possessed. However, the first requirement of mandament van spolie does not require Menzies to have a legal right to possess the property. The cause of Menzies' possession is irrelevant for purposes of the current enquiry. It is likewise irrelevant whether the NAC has a stronger right or claim, such as ownership. The mandament van spolie protects only physical possession and not the right to possession.

Was Menzies unlawfully deprived of possession?

[44] It is undisputed that Menzies was prevented from entering the premises of HKIA on the morning of 19 August 2023.

[45] Menzies maintains that these actions were unlawful as the respondents had no legal power to dispossess it. In support of this contention, this court was referred to the Ueitele judgment, wherein Ueitele J held that the eviction order granted by Sibeya J was not extant anymore and was overtaken by a new agreement entered into between Menzies and the NAC on 30 June 2022.

[46] In para 41 of the Ueitele judgment, the court held:

[41] I return to the argument that Menzies had to continue to render ground handling services until it was given notice by the Airports Company. It furthermore follows that the Airports Company cannot rely on the Judgment and orders of Justice Sibeya as confirmed by the Supreme Court on 13 June 2023 to terminate and evict Menzies from HKIA, because Menzies is not rendering the ground handling services in terms of the agreement that Justice Sibeya found terminated on 30 June 2022, but is rendering ground handling services in terms of the notice of 30 June 2022 by the Airports Company to all stakeholders. It follows that, if the Airports Company cannot evict Menzies on the basis of the contract that terminated on 30 June 2022, I cannot order a stay of the order of 29 June 2022.¹

[47] The merits of the applicant's possession and the respondent's right to possession are not justiciable. As a result, there are a few defences available that do not amount to a denial of the applicant's allegations. An exception, subject to the Constitution, is that of a statutory right to dispossess.¹² Another exception is a court order.

[48] On the morning of 19 August 2023, when Menzies staff members stood before locked gates, the Deputy Sheriff presented to Messrs Smith and Viljoen the judgments of Sibeya J and the Supreme Court judgment.

[49] The judgment of Sibeya J contains an eviction order. Our Apex Court confirmed this judgment and order. On behalf of Menzies, it was argued that the 'old' judgments are no longer extant as neither Sibeya J nor the Supreme Court was aware of the new agreement that came into existence between Menzies and the NAC at the time of delivery of the judgments. The 'new agreement' issue is a debate for another day as it is subject to an appeal. However, I need to point out that the multitude of applications that came before our courts resulted in conflicting judgments regarding the 'new agreement', especially if one considers the judgments of Rakow J and Ueitele J.

¹² LTC Harms Ambler's Precedent of Pleadings 9th Edition Lexis Nexis at 341-342.

[50] The respondents rely on the Sibeya and Supreme Court judgments to support their argument that no unlawful dispossession occurred. In contrast, the applicant relies on the Ueitele judgment to support its argument that there was unlawful dispossession.

[51] The question is, what is the status of the Ueitele judgment in light of the appeal and cross-appeal filed by Menzies and Paragon?

[52] Menzies is of the view that the notice of the cross-appeal is a nullity. Menzies complained that, firstly, it was not the NAC that appealed the orders by Ueitele J and submitted that the winning party could not appeal a judgment in its favour. Secondly, it was submitted that the appeal was launched by Paragon, an illegal entity, because of its joint venture status. Mr Heathcote conceded that Menzies only appealed para 33 in the judgment of Ueitele J, which dealt with the notice period of 30 days, and not the court's order. However, in the same breath, Mr Heathcote calls out Paragon for doing the same and then proceeds to say that Paragon could not appeal only specific paragraphs of the reasons in the judgment. I must say that the 'two wrongs do not make a right argument' advanced by Mr Heathcote in this regard has a hollow ring to it. This argument is clearly aimed at an attempt for this court to disregard the cross-appeal by Paragon.

[53] Paragon might not be the party that evicted Menzies from HKIA and plays a lesser role in the current spoliation application. However, Paragon was a respondent in the proceedings before Ueitele J and its rights were directly impacted by the order made during those proceedings. Nothing can preclude Paragon from launching a cross-appeal. Paragon appealed, amongst other things, against orders 1, 2 and 6 of the Ueitele judgment¹³ and not just against a paragraph in the judgment.

¹³ '1 It is declared that the notice which the Namibia Airports Company Limited on 9 June 2023, gave to Menzies Aviation (Namibia) (Pty) Ltd to cease the rendering of the ground handling services and vacate the Hosea Kutako International Airport was not reasonable and is thus invalid.

2. The notice of 9 June 2023, referred to in paragraph 1 of this Order is set aside.

6. Each party must pay its own costs.'

[54] One cannot lose sight of the fact that the order of Ueitele J had the effect of yet again extending the date that Paragon could start rendering the ground handling services at HKIA. Paragon is therefore a prominent role player in the current litigation despite Menzies' belief to the contrary.

[55] Mr Heathcote submitted that this court should not even know of the appeal launched against the judgment of Ueitele J and regard should not be had to it. This might be so in a matter that does not have such an extensive history. However, the appeal and cross-appeal filed by the parties impact the status of the Ueitele judgment and more importantly Justice Ueitele made pertinent findings regarding the Sibeya judgment and the Supreme Court judgment that cannot be disregarded as the applicant relies on it.

[56] The cross-appeal by Paragon would specifically have the effect of suspending the order pending the appeal. Rule 121(2) of the Rules of Court provides as follows:

'2. Where an appeal to the Supreme Court has been noted the operation and execution of the order in question is suspended pending the decision of such appeal, unless the court which gave the order on the application of a party directs otherwise.' (my emphasis)

[57] The next arrow in Menzies' quiver was that the cross-appeal by Paragon was not properly filed when Menzies was despoiled on the morning of 19 August 2023. Mr Heathcote stated that Menzies did not know about the cross-appeal as it never received it, and it was filed at the 11th hour at the GOSP offices¹⁴ at the Law Society shortly before closing time on Friday, 18 August 2023. Mr Heathcote submitted that for the cross-appeal to be effective, it had to be filed during court hours, and, in addition thereto, not all the parties received notice of the cross-appeal.

[58] Mr Heathcote further submitted that the NAC never withdrew its notice to Menzies that it needed to vacate the premises of HKIA on 10 September 2023, therefore, the NAC

¹⁴ General Office for Serving of Process at the Namibian Law Society.

was *functus officio* their decision and Menzies had at least until 10 September 2023 at the HKIA premises and could not be evicted the way in which the NAC did.

[59] On the issue of the cross-appeal, it should be pointed out that it is the function of the Supreme Court to decide if it is a nullity or not. It is not for this court to decide this issue. Having considered the papers before me, it is clear that the cross-appeal was delivered at the GOSP offices at the Law Society at 14h30 on 18 August 2023 and at 14h35 at the office of the Registrar of the High Court. The notice to appeal was also uploaded on e-justice, albeit at 16h25. It is further undisputed that the cross-appeal was duly accepted by the Registrar of the Supreme Court, having verified that it has been served on all parties including the Registrar of the High Court.

[60] Menzies' legal practitioner of record would have received a notification via the e-justice system of the filing of the cross-appeal even if he was unaware that the cross-appeal was delivered to the GOSP offices.

[61] In my view, there was nothing untoward in how Paragon effected service at the GOSP offices. This type of delivery happens every court day, and even if the service of the cross-appeal was less than perfect, it does not cause the cross-appeal to be a nullity or non-existent.

[62] There are no merits in the remarks made by Mr Heathcote that there were unlawful stratagems at play in this matter. There was delivery in terms of the rules, which provide that "deliver" means to serve copies to all parties and file the original with the registrar, and the service or filing could be by electronic means.

[63] I am therefore satisfied that arguments advanced by both Mr Maleka, on behalf of the NAC, and Mr Namandje, on behalf of Paragon, that the only extant judgments are that of Sibeya J and the judgment of the Supreme Court in light of the appeal in respect of the Rakow and Ueitele judgments, which suspended the execution of those orders. Resultantly, the judgment and orders of Justice Ueitele for the purpose of this application have no operative effect.

[64] In addition thereto, Menzies cannot now be heard to complain that the NAC is *funtus officio* regarding the 30 days' notice period as Menzies immediately appealed against one sentence under para 33 of Justice Ueitele's judgment. It further rejected the NAC's 30 days' notice to vacate, which was dispatched before Menzies filed an appeal against Justice Ueitele's judgment and order. Resultantly, the NAC's 30 days' notice of 8 August 2023 fell away due to the rejection, non-acceptance and repudiation by Menzies and was, in any event, rendered inoperative by the appeal filed by Menzies.

[65] The Deputy Sheriff was armed with a clear court order as incorporated in the order of Sibeya J (as confirmed by the Supreme Court) that states that:

'3. It is declared that the first respondent shall, at the end of the day on the termination date:

- 3.1 cease to provide ground handling services at HKIA;
- 3.2 hand over all security access cards or other equipment entitling it to access HKIA or any premises which it occupies at HKIA by virtue of the ground handling services agreement with the applicant;
- 3.3 vacate occupation of any premises at HKIA occupied by virtue of the ground handling services agreement.

4. If the first respondent refuses to give effect to the order set out in paragraph 3 above, then the Deputy Sheriff of this Court is directed to:

4.1 evict the first respondent from HKIA and from all premises of HKIA occupied by the first respondent by virtue of the ground handling services agreement;

4.2 remove all equipment belonging to the first respondent from the HKIA.' (my underlining)

[66] The order evicting Menzies could not be put in more precise terms than that. This is exactly what happened on the morning of 19 August 2023. The Deputy Sheriff acted in terms of a court order issued by this court, which falls within the exceptions that can successfully be raised as a defence against an application for mandament van spolie.

[67] Menzies raised the issue of the absence of a 'warrant of eviction' in its founding papers, which appears to be in line with the Magistrate Court Act 32 of 1944, which provides for a warrant of ejection. It is not in line with the High Court Rules. The current facts should not be confused with monetary cases where, in accordance with Form 22 of the Rules of the High Court, a writ of attachment may be necessary. I am of the view that there are no merits in this complaint raised by Menzies.

[68] In conclusion, I am of the view that from the time of the filing of the cross-appeal and onwards, the order of Sibeya J was operative, and Menzies was under no legal obligation to provide and similarly had no legal right to insist on providing ground handling services at HKIA. Consequently, Menzies had no legal right to continue to occupy any premises at HKIA (which was incidental to its obligation to provide ground handling services during the duration of the agreement and the noted appeal). As a result, I am of the view that the NAC was entitled to enforce the extant Sibeya judgment of 29 June 2022 and the Supreme Court judgment of 9 June 2023. I therefore find that Menzies failed to discharge its onus in respect of the second requirement of mandament van spolie.

The third and sixth respondents

[69] The Minister of Safety and Security and the Inspector-General of the Namibian Police were cited as respondents by the applicant, not as interested parties, but Menzies actually sought relief against these parties and persisted with same even after having read the papers of these respondents.

[70] Neither of these parties has a horse in the current race. The Deputy Sheriff of Windhoek admittedly carried out the eviction in the presence of members of the Namibian Police and employees of the NAC. However, the Namibian Police did not act in any way to prevent Menzies from accessing HKIA.

[71] During his argument, Mr Chibwana made it clear that the Namibian Police have a statutory duty to be at our international airport to maintain law and order. I agree with the submissions made in this regard.

[72] Mr Chibwana sought a punitive cost order against Menzies. However, I believe that the current circumstances do not call for such an order.

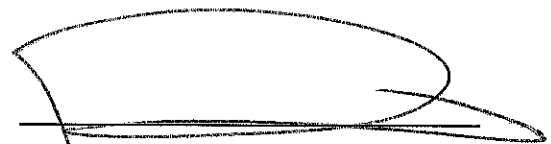
Costs

[73] In my view, costs should follow the result.

Order

[74] My order is as follows:

1. The application is dismissed with costs.
2. The applicant is ordered to pay the costs as follows:
 - a. in respect of the first respondent, such costs consequent upon the employment of one instructing and two instructed counsel;
 - b. in respect of the second respondent, cost of three legal practitioners;
 - c. in respect of the fourth and sixth respondents, such costs are consequent upon the employment of one instructing and one instructed counsel.
3. The matter is regarded as finalised and removed from the roll.



JS Prinsloo
Judge

APPEARANCES:

For the applicant:

R Heathcote (assisted by J P Jones)

Instructed by

Viljoen & Associates

Windhoek

For the first respondent:

IV Maleka (assisted by UV Hengari)

Instructed by

Shikongo Law Chambers;

Windhoek

For the second respondent:

S Namandje (assisted by J Janke & K Gaeb)

Sisa Namandje and Co Inc.

Windhoek

For the fourth and sixth respondents:

T Chibwana

Instructed by the Office of the Government
Attorneys

Windhoek