

SOUTH AFRICA / JUDGMENT

Comair Limited v Neluheni NO (37232/16) [2017] ZAGPPHC 880 (6 September 2017) [2017] ZAGPPHC 880

COURT

North Gauteng High Court, Pretoria

BEFORE

T J Raulinga

CASE / FILE NUMBER

37232/16

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO. 37232/16

In

the matter between:

COMAIR

LIMITED APPLICANT

and

MALINDI

NELUHENI

N.O RESPONDENT

(In

her capacity as Chairperson of the Air Services Licensing Council)

JUDGMENT

RAULINGA J,

1. This is an application in Part B of which the applicant ("comair") seeks an order to review and set aside the following divisions of the respondent ("th Council") (Collectively "the Decisions"):

1.1 The decision of 5 May 2016, alternatively 29 February 2016 alternatively, 10 July 2015, further alternatively such other date unknown to Comair on which the decision was made, suspending the Class 1 Type 51 Category A 1 air services licence ("the Licence") which the Council granted to Comair in 2001 ("the suspension division");

1.2 The decision taken on 5 May 2016, alternatively on a date unknown to Comair, to implement the suspension decision alternatively refusing to delay implementation pending a review of the Decision;

1.3 The decision of 29 February 2016 as contained in the letter to Comair on 3 March 2016, annexed to the founding affidavit ; and /or

1.4 The decision of 10 July 2015 notified to Comair ON 3 July 2015 directing compliance with section 16(4) of the Air Services Licensing Act 115 of 1996("the ASL Act").

2. Granting Comair the reserved costs of Part A of this application of 11 May 2015 and 17 May 2017.
3. Granting Comair the costs of Part B of this application.
4. Prior to this application, Comair had launched two urgent applications in Part A, which were granted on 11 May 2016 and 17 May

2016 with reserved costs. In these two applications Comair had sought urgent relief interdicting and suspending the operation of the Council's Decisions pending the outcome of this application. I will deal briefly with these two applications herein below.

5. The brief history of this matter set out in Comair's founding affidavit, commenced more than three years ago, in January 2014, when Comair's competitors SAFair Operations (Pty) Ltd ("SAFOPS"), lodged a complaint with the Council, alleging inter alia that Comair's shareholding did not comply with the ASL Act. In that complaint SAFOPS contended that Comair's shareholding did not comply with section 16(4)(c) of the ASL Act which requires that 75% of the voting rights in Comair be held by residents of the Republic of South Africa. SAFOPS had also earlier complained to the Council that Comair did not comply with section 14(2)(d)(i) of the ASL Act. SAFOPS suggested that there had been a change of the controlling shareholding in Comair as a result of Comair having repurchased some of its shares.
6. In the second complaint, SAFOPS suggested that Comair did not comply with section 16(4)(c) of the ASL Act because more than 25% of the voting rights in Comair were claimed to be held by parties who are non-residents of the Republic. The sole ground on which SAFOPS advanced this complaint related to one of Comair's shareholders, BB Investment Co (Pty) Ltd ("BB Investment") SAFOPS suggested that a "look-through" approach should be applied and that the foreign ownership component of Bidvest should be attributed to Comair.

7. The complaints by SAFOPS were made after Comair had complained about SAFOPS application for a licence and after this Court had found that SAFOPS should be interdicted from operating because it did not comply with the ASL Act.
8. Various correspondence were exchanged between Comair and SAFOPS and also between SAFOPS and the Council. Subsequently, SAFOPS capitulated indicating that it was not persisting with the complaints. Notwithstanding this, and without having engaged with Comair in respect of the substance of the responses to the complaints, in July 2015 the Council informed Comair that it was not in compliance with section 16(4) of the ASL Act and required it to comply with the provisions of section 16(4) of the ASL ACT within 120 day period.
9. Thereafter, Comair and the Council exchanged numerous correspondence, including one in which Comair requested the Council to suspend the remaining portion of the 120 day period in which it required compliance so that Comair could understand the manner in which the Council considered that Comair was not compliant and the steps which, in the Council's view, were necessary for Comair to render itself compliant. Apparently the Council did not engage with Comair's submissions or indicate in which respect they were considered wrong, inaccurate or deficient.
10. In spite of this, on 29 February 2016, Comair received a further compliance correspondence from Council, which is dated 22 July 2015. This invokes a non-compliance with sections 14(2), 16(4) and 20(1) of the ASL Act. The correspondence exchanged between Comair and the Council are contained in the founding affidavit and the supplementary founding affidavit of Comair. There is no need to regurgitate same except where necessary as this judgment continues.
11. As already indicated above it is these purported Decisions that Comair submits must be reviewed and set aside, because in its view, they are irrational and unreasonable and therefore ultra vires. Further that the Decisions are procedurally unfair and the Council failed to take into account relevant considerations.
12. On the contrary the Council argues that, it did not take a decision to suspend or cancel the applicant's licence. It has only exercised its powers in terms of section 20(1)(a) of the ASL Act. Further that the review application is premature.
13. It is common cause that these proceedings are review proceedings governed by the provisions of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
14. An action will fall to be reviewable under PAJA if it is an administrative action. Section 1 of PAJA defines an administrative

action as ".....any decision taken or any failure to take a decision by -

- (a) An organ of state, when

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
 - (b) A natural or juristic person other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect".
15. For an action to qualify as an administrative action and reviewable under PAJA it must meet three requisites, namely, action taken by an organ of state exercising power, the action must adversely affect the rights of another person, and must have a direct and external legal effect.
16. It is indeed true that an administrative action requires finality. An administrative action is defined in section 1 of PAJA to be, inter alia, a 'decision' which has a direct, external effect. In *Chairman State Tender Board v Digital Voice Progressing (Pty)Ltd*; *Chairman, State Tender Board v Sneller Digital(Pty)Ltd* 2012(2) SA 16(SCA), the Court quotes Hoexter as follows:

"The PAJA does not refer to ripeness as such. However, Section 1 of the Act appears to underscore the requirement of ripeness by confirming the ambit of administrative action - the gateway to the Act - as a decision, and moreover one with direct effect. Both of these terms suggest finality".

17. In its reference to paragraph 21 in *Chairman, State Tender Board* (supra) the counsel for the Council omitted to refer to paragraph 17 of the case, in which the Court quoted Baxter who said; "the appropriate criterion by which the ripeness of the action in question is to be measured is whether the action is complete or not: while finality is usually achieved when an administrative decision has been made known - and from a practical perspective, notification to the affected party is usually the trigger for the challenge to the decision - notification is not necessarily the proper indication that a decision is ripe for a challenge".
18. In paragraph 20 at 23 of the same case, the Court said the following:

"Generally speaking whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process....."

19. In casu, the Council avers that it has not yet taken a decision to suspend Comair's licence, and that it has only acted in terms of discretionary power conferred upon it by section 20(1)(a) of ASL Act. Yet the Council ignores the fact that the aforesaid section provided that it may direct a licensee (Comair) to comply with the provisions of the ASL Act within the period it may determine, if it on reasonable grounds suspects that a licensee has failed to comply with a provision of the ASL Act. In my view this amounts to an administrative decision, whether the decision is a preliminary one or the ultimate decision in a layered process such as is the case here does not matter. The Council took a decision which affects the rights of

Comair. Moreover the decision was taken without giving an opportunity to Comair to explain itself.

20. One must be mindful of public interest in the finality of administrative decisions and acts. In this case there is public interest by the passengers in the airfreight in general and Comair in particular. As Lord Atkin said in *Ras Behari Lal and others v The King Emperor* [1933] 102 LJ (CP) 144 [50 TLR1; [1933] 150 LT3; ALL ER 723]

'It would be remarkable indeed, if what may be "a scandal and perversion of justice" may be prevented during the trial, but after it has taken effect the courts are powerless to interfere. Finality is a good thing, but justice is better'. See in this regard *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 (SCA) at 354 paragraphs [80] and [81].

21. The contention by the Council that it did not take any decision and that the review is premature contradicts the Council's position in that it repeatedly communicated to Comair stating unequivocally that it was *functus officio*, that the Decisions could not be revisited and that Comair must approach a competent court to set them aside. Now that Comair has approached this Court the Council changes tact and says it has taken no decisions. This conduct is disingenuous of the Council. The matter must be decided on facts and the interests of justice. The Council took a decision when it directed Comair to comply with the provisions of the ASL Act within the period of 120 days.
22. We know now that on 7 April 2014 the Council advised Comair that SAFOPS had made a complaint about Comair's licence which was in two parts. The first part was that Comair did not comply with section 14(2)(d)(i) of the ASL Act. SAFOPS suggested that there had been a change of the controlling shareholding in Comair as a result of Comair having repurchased some of its shares.
23. The second part is that SAFOPS suggested that Comair did not comply with section 16(4)(c) of the ASL Act because more than 25% of the voting rights in Comair were claimed to be held by parties who are not residents of the Republic. The sole ground on which SAFOPS advanced this complaint related to one of Comair's shareholders, BB Investment. SAFOPS accepted that BB Investment is a South African Company which in turn is 100% owned by Bidvest Group Limited ("Bidvest") which in turn is 47.9% Foreign owned. SAFOPS suggested that a "look-through" approach should be applied and that the foreign ownership component of Bidvest should be attributed to Comair ("Foreign shareholder issue").
24. On 21 May 2014 Comair provided a full reply to the complaint to the Council. When answering the foreign shareholding issue Comair

provided a break-down of the parties who held voting rights in Comair and attached an extract of its annual report of shareholders, which demonstrated that at the time only 16.97% of the voting of the voting rights in Comair were held by parties that are not residents of the Republic.

25. After exchange of several correspondence between the Council, Comair and SAFOPS, the Council on 19 November 2014, requested further information from Comair, which Comair provided without much delay. The information comprised of "proof of citizenship and ordinary residence of the directors members.....and both trustees and beneficiaries". Among other reports Comair provided the Council with a report prepared by Computer Share Outsourcing setting out a summary of Comair's shareholding. A spread sheet created by State Central Securities Depository setting out the details of all dematerialised shareholders of Comair. A report prepared by Vaca Holdings providing an analysis of both the certified and uncertified shareholding in Comair.
26. On 28 May 2015 the Council asked Comair to provide "proof that it can satisfy itself that the requirements of the ASL Act have been met in Comair in illustrating the indirect and direct shareholding as well as voting rights of the various entities".
27. In that letter the Council referred to the submissions made by Comair and said that the submissions "still do not reflect the issues of direct and indirect voting rights held by various shareholders within Comair". This letter concluded with the Council saying that it has "resolved" that if "this information of compliance by Comair" does not reach the Secretary on 14 June 2015 then "the Council will exercise its rights in terms of the ASL Act, which may include suspension of Comair's licence": In reply Comair indicated that it complied with the ASL Act when the licence was issued to it. It is apparent from the correspondence between the Council and Comair that the Council did not engage with the extensive information provided to it, including the independent expert reports. Notwithstanding the attitude of the Council, Comair provided detailed replies to the Council dealing with all issues pertaining to voting rights.
28. However, without any prior warning, Comair received the July Decision
 - still Comair made further submissions on this Decision. Subsequent to that Comair was informed by the Council Secretariat that the Council had obtained a legal opinion which apparently had essentially confirmed Comair's compliance and that this legal opinion would be shared with Comair. Surprisingly, this legal opinion was never shared with Comair.
29. Instead and without any further notice, Comair received the February Decision in March 2016, which curiously was dated 22 July 2015 even though it was purportedly made in February 2016. This culminated in Comair bring the urgent application referred to herein above.
30. As Comair correctly submits, section 16(4)(c)(i) of the ASL Act provides for a maximum holding of foreign voting rights in a licence holder. Comair demonstrated comprehensively and in detail, including with reference to relevant independent experts reports, that more than 75% of voting rights in it were held by residents of the Republic. However the Council for no apparent reason vacillated in its reasons of decision ("ROD") that the total number of non-resident voting rights is 50%. This is a new contention and calculation which had never previously been put to Comair in any manner whatsoever.

31. It also emerged for the first time in the ROD that the Council had included "Allan Gray" in arriving at the figure of 50% for Comair's non-resident shareholding. The explanation in this regard including "the look through principle" by Comair appears in the correspondence between it and the Council. There is no need to repeat same.
32. Comair correctly submits that there were no reasonable grounds to suspect non-compliance.

In *Kimberly Junior School v Head, Northern Cape Education Department* 2010(1) SA 217 (SCA) para 12 the Court defined an objective jurisdictional fact as:-

".....the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. Here the objective existence of the fact or state of affairs is justiciable in a court of law. If the court finds that objectively the fact or state of affairs did not exist, it will declare invalid the purported exercise of the power".

33. The requirement of reasonable grounds to suspect that Comair was non-complaint is an objective jurisdictional fact on which the exercise of the Council's power is conditional. The two initial complaints lodged by SAFOPS, which is a competitor of Comair were not persisted with. The Council made its July Decision only 20 months after a series of exchanges between SAFOPS and Comair. Even after this decision was taken, the Council continued to request from Comair and to consider additional information. It also suspended the 120 day period which it had initially specified for compliance. This is an indication that as of 10 July 2015 the Council could not have reasonable grounds to suspect non-compliance. This therefore follows that the jurisdictional fact required for the July Decision to be made was not satisfied.
34. The power confirmed on the Council in terms of section 20 of the ASL Act may only be issued once the Council already has reasonable

grounds to suspect non-compliance. It cannot be issued for the purpose of providing an opportunity to explain. The Council by so

acting, put the cart before the horse. Accordingly, on 10 July 2015, the Council would not have had the reasonable grounds required under the ASL Act.

35. The Decisions of the Council are further paralysed by the fact that it obtained independent legal advice after the July Decision had been made. This is the opinion that the Council had earlier promised to share with Comair which it did not do. This is an indication that the Council did not believe that it had reasonable grounds for suspension.
36. It is apparent from the record that, notwithstanding the fact that the Council had already purported to make its July Decision on 10 July 2015, on 29 February 2016 it purported to revisit the July Decision with the February Decision, which for inexplicable

reasons

is dated 22 July 2015. Again, in respect of this February Decision the Council gave no indication of the respects that Comair was not complaint. As a consequence the February Decision as well is flawed.

37. Comair contends that there is no corresponding resolution of the Council or minutes of the meetings referred to in the ROD. Comair submits further that it specifically asked the Council as whether it wished to supplement the ROD. The Council declined to do so. The Council also failed to provide the transcript of the meeting. This issue is also not dealt with by the Council in its answering affidavit.
38. In the circumstances the Council acted ultra vires which renders its Decisions unlawful which fall to be reviewed and set aside.
39. A reviewable irregularity exists wherever a decision -maker in making, its decision fails to take into account considerations which are relevant and bases its decisions on irrelevant considerations - PAJA section 6() (e) (iii). This applies even where a decision maker affords undue weight to relevant or irrelevant considerations - Minister of Health v New Clicks SA (Pty) Ltd 2000 (2) SA 311 CC para [530].
40. When the Council came to the conclusion that Comair exceeded the foreign shareholder requirement it considered the private residence

of Allan Gray and his family, which was entirely irrelevant. The Council ignored the extensive evidence that had been placed before it including that the shares were .held by Unit Trust Funds and not by Allan Gray or his family, which was entirely irrelevant. The Council ignored the extensive evidence that had been placed before it including that the shares were held by Unit Trust Funds and not by Allan Gray or his family. The Council did not only consider the voting rights held by the BB Investment in Comair but also the voting rights in Bidvest in BB Investment. I agree with Comair that this is irrelevant under section 16(4)(c)(ii) of the ASL Act. Therefore the Council took into account irrelevant issues or failed to take into account those that were relevant.

41. The Court has the power to review administrative action if it was materially influenced by an error of law. It has been held that an error is material where it affects the outcome of decision - PAJA; section 6(2)(d) and Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010(6) SA 182(CC) para [91]
42. Again, I agree with Comair that in assessing Comair's compliance with the foreign shareholders requirement, the Council incorrectly adopted a "look through" approach, contrary to the express provisions of section 16(4)(c)(ii) of the ASL Act. This was a material error of law in the Council's interpretation of the relevant provisions of the ASL Act.
43. I have already intimated above that the July Decision is contrary to the provisions of the ASL Act in particular section 16 (4)(c)(ii). In my view the material errors in the July Decision renders it irrational, arbitrary, unreasonable and procedurally unfair. The Council's failure

to afford Comair a fair procedure prior to making its decision is procedurally unfair. The ASL Act expressly provides for an extremely detailed and robust procedure prior to the Council making a decision. Under section 20(3) of the ASL Act the Council is specifically afforded discretion in circumstances where it is considering whether there are reasonable grounds to suspend non-compliance with the ASL Act to evoke the detailed procedural provisions of section 16(3).

44. In the same vein the February Decision is plagued because it is procedurally unfair. It is also arbitrary, irrational, unreasonable

and failed to take into account relevant considerations. Further in as far as the February Decision is concerned, the Council provided no reasons. PAJA expressly provides that where a decision - maker fails to furnish adequate reasons for an administrative action it must, in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the action was taken without reason - PAJA section 5(3).

45. In the result the Decisions fall to be reviewed and set aside.

46. As indicated in paragraph 4 of this judgment, prior to this application Comair had launched two urgent applications one granted

on 11 May 2016 and another on 17 May 2016. The costs in these two applications were reserved. It is trite that costs follow the result. This simply means that the Council must be ordered to pay the costs in the two urgent applications as well as in this application.

47. There remains one more thing to say about the conduct of the Council in this proceedings. Firstly, the Council filed heads of argument of about 7 pages, whereas Comair filed detailed and erudite heads of 80 pages. The respondent's heads of argument offered very little help for the purposes of writing this judgment. There was very little to gauge and compare the Council's case with that of Comair. The scales were not balanced. Consequently, I was forced at times to regurgitate the submissions of Counsel for Comair and clothe them in my judgment. Secondly there are no convincing reasons why the Council allowed this matter to run its full course without making an attempt to settle it outside court. Had it not been for the mere fact that Counsel for the Council were briefed by the State Attorney. I would have been obliged to grant an order of costs de bonis propriis. Be that as it may, a punitive costs order must be granted.

48. In the result I make the following order :

48.1. The application is granted with costs.

48.2. The Council is ordered to pay costs of the two urgent applications on the scale as between attorney and client.

48.3. The Council is ordered to pay the costs of this application on the scale as between attorney and client.

48.4. The costs are inclusive of the employment of two counsel.

T J RAULINGA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

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