
SOUTH AFRICA / JUDGMENT

Minister of Home Affairs and Others v Fireblade Aviation Proprietary (8576/2016; 93450/2016) [2017] ZAGPPHC 949 (8 December 2017) [2017] ZAGPPHC 949

COURT

North Gauteng High Court, Pretoria

BEFORE

S Potterill

CASE / FILE NUMBER

85376/2016 & 93450/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 85376 /2016

93450/2016

8/12/2017

Not reportable

Not of interest to other judges

Revised.

In the matter between:

MINISTER OF HOME AFFAIRS

First Applicant

DIRECTOR-GENERAL OF HOME AFFAIRS

Second Applicant

SOUTH AFRICAN REVENUE SERVICE

Third Applicant

DENEL SOC LIMITED

Fourth Applicant

AIRPORTS COMPANY SOUTH AFRICA

SOC LIMITED

Fifth Applicant

PRECINCT 2A INVESTMENTS PROPRIETARY

LIMITED

Sixth Applicant

and

FIREBLADE AVIATION PROPRIETARY LIMITED

Respondent

JUDGMENT:

APPLICATIONS FOR LEAVE TO APPEAL

POTTERILL J

[1] The Minister of Home Affairs ("Minister"), the first applicant and the Director-General of Home Affairs ("DG"), the second applicant, are applying for leave to appeal to the Supreme Court of Appeal against my order and judgment handed down on 27 October 2017. The South African Revenue Service, the third applicant, also filed an application for leave to appeal against the judgment, but subsequently withdrew the application. Denel SOC Limited ("Denel"), the fourth applicant, also filed an application for leave to appeal. Fireblade Aviation Proprietary Limited ("Fireblade") opposes these applications for leave to appeal.

The Minister's and DG's application for leave to appeal

[2] 2.1 Failure to adjudicate the counter-application. This ground of appeal raised the fact that I did not consider the counter-

application in totality and separately, but only in respect of the substantive challenge. In argument it was expanded on that there was accordingly no procedural fairness as the Minister and DG were entitled to an explicit judgment thereon. Although the complaint is one of procedure it amounted to a violation of a fair hearing.

2.2 There is no specific order relating to the counter-application and this is a regrettable omission. Just as in paragraph 9(3) of the judgment the printers' devil reflects "a new port of entry" instead of "Customs and Immigration Services at the FBO". This aside, it was conceded that the substance of the counter-application is specifically addressed in the judgment. The Minister and DG know why the counter-application was unsuccessful. In any event, the counter-application is the flipside of the argument of the Fireblade coin. There was a very fair hearing of

over two days. Whether the power of the Minister to designate a place as a port of entry can only be used where such port of entry will be used by all persons and become accessible to all persons is found to be flawed and, in fact, meritless. There are no prospects of success that another court will find that such argument has merit. The mere fact that the counter-claim is not pertinently dismissed can never, on its own, or in conjunction with the other grounds render the judgment appealable.

[3] "Plascon Evans test" and the factual matrix

I find there to be no reasonable prospects of success that another court will find that I weighed up the probabilities of conflicting

versions on affidavits contrary to the test set out in Plascon Evans.[1]

[4] The lawful application of section 9A

In argument nothing was made of this ground of appeal. There are simply no prospects of success that another court will find that Fireblade's application was one brought under section 9A i.e. a new port of entry. There are also no reasonable prospects of success that another court will find merit in the Minister's argument that the designation of the FBO as a new port of entry was a prerequisite for the provisions of the Customs and Immigration Services. No other court could also find that section 9A does not permit the establishment of a facility which is not available to the public as a whole. This is sufficiently addressed in the judgment and there are no prospects that another court will find that persons privileged enough to travel internationally on commercial aircraft who are processed at the main terminal of ORTIA will have their constitutional rights violated by the fact that other travellers are processed at the FBO.

[5] The process did not follow sections 19.5 and 217 of the Constitution

In argument, contrary to the written heads, the high water mark for the prospects of success on appeal to the Supreme Court of Appeal was the argument that the rendering of ad hoc customs and immigration services at the FBO required a competitive process in terms of section 217 of the Constitution. The finding that the rendering of the services did not require a competitive process i.e. a public tender process was opening up an avenue for abusive public power by secret negotiations.

The factual matrix constituted *res nova* because there is no case law on this point and this renders there to be prospects of success on appeal. The argument was that the court must interpret the words "contract" and "goods and services" in section 217 widely. If the Minister did approve the services, then there was a contract concluded. This contract would then fall under the ambit of section 217.

5.1 Section 217(1) provides "[w]hen an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, .contracts for goods or services, It must do so in accordance with a system which Is fair, equitable, transparent competitive and cost-effective". On no Interpretation can this section be applicable to this decision of the Minister. Section 217 regulates the State's procurements of goods and services and not an undertaking by the State to provide a service at no expense to itself.

5.2. Section 195(1) provides that "public administration must be governed by the democratic values and principles enshrined In the Constitution." As the decision of the Minister did not adhere to section 195(1) the Minister's decision is unlawful, so the argument went. I cannot imagine a more transparent negotiation than the four years herein. Fireblade leased the premises from Denel with the specific purpose to run the FBO. Fireblade cannot lease the premises for their express purpose to then have a tender process.

There was simply no favouritism as argued. This was not a behind-the-closed-doors negotiation between Fireblade and a Minister,

but multi-disciplinary meetings upon meetings, fulfilling requirements from various Ministers and their Departments and from many stakeholders. The FBO in private hands is not something new; Kruger and Lanseria Airports are examples as forerunners of the FBO

In question. The payment for this service was dealt with in the judgment. In the opposition to the application the "budgetary constraints" was never elevated to the status itls now accelerated to. Nothing rides hereon, Fireblade undertook, and this was accepted by the Minister of Finance, to pay for the services. An appeal based on this argument would not have a reasonable prospect of success.

5.3 In argument it was also raised that this ground of appeal sets out compelling reasons as to why the appeal should be heard because it would be in the public interest. It was reiterated that this decision by the Minister could lead to a Minister bypassing sections 217 and 195 granting favouritism in negotiations with a private party instead of the public being afforded an opportunity to tender. This ground of appeal would seemingly fall under section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 ("the Act") but was not raised in the grounds of appeal. However, upon consideration this argument is rejected for all the reasons set out supra and there are no reasonable prospects of success that another court will accept this argument.

[6] In. argument nothing was made of the finding that on 28 January 2016 the Minister did convey his approval that Customs and Immigration

Services be rendered at the FBO. This finding is however raised as a ground of appeal. On motion proceedings a court does not readily make findings that a Minister's version is untenable and palpably untrue; in this matter it had to be done. There are no prospects of success that another court will come to another conclusion.

[7] Denel's application for leave to appeal

7.1 Denel is applying for leave to appeal because the application to strike-out was dismissed and the hearsay evidence was left intact. They also appeal the costs order granted against them.

The striking-out application

The crux of the appeal against the striking-out is that the court applied the wrong test i.e. a subjective test as opposed to an objective test for establishing whether Denel was prejudiced by the allegations that formed the subject matter of the striking-out application.

7.2 The nature of the allegations to be struck out was set out as the only explanation that Fireblade could see for the inexplicable double “flip-flop” that Denel made, that in turn led to the Minister's change of stance on his approval to render the Customs and Immigrations Services at the FBO. Denel not only defended the actions of Denel but also that of the Minister. It was argued that Denel had security concerns as far back as 2013 and that any influence or interference from a third party was thus preposterous. This submission by Denel was rejected.

7.3 Did Fireblade have to provide a reason as to why it thought that Denel had made a flip-flop; in law the answer is no. But it was not wrong to do so. Denel, whom against no relief was sought, did not seek to apply only for a striking-out but defended Denel's actions and went further defending the Minister's actions. In the context of the whole matter I exercised my discretion judicially and did not touch on any evidence not necessary to come to a finding. The newspaper articles attached existed, striking it out would have no effect. Denel's denial of interference by a third party stands. The averments that Denel interacted with a third party has in the media long sailed. There are no reasonable prospects that the Supreme Court of Appeal will in these circumstances entertain only an appeal pertaining to striking-out or will come to another conclusion on this application.

7.4 The admissibility of the hearsay evidence

Ruling

on the hearsay evidence as inadmissible would be a brutum fullum; nothing turned on it and no finding was made on any hearsay evidence. There are no prospects of success.

7.5 The appeal against the costs order

Denel's appeal against the costs order is astonishing. Denel conducted itself as an opposing party, although no relief was sought against it. If it only brought the application to strike-out a costs order against them could have been unjustified. To illustrate that I exercised my discretion judicially I refer to as example the extent of the opposition by Denel; just the chronology that Denel handed up was 18 pages long referring to more than a 151 documents. This chronology did not relate to the striking-out application. Denel argued that this court, must at its leisure, read the affidavit to the urgent application without canvassing or incorporating the passages relied on in Denel's affidavit. This is of course contrary to the general rule as confirmed in the National

Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 47 :

"It is not proper for a court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained."

The point being, Denel not only filed a long opposing affidavit setting out opposition to Fireblade's application, it also referred to documents not incorporated, it made use of a substantial chronology with more than 151 documents and argued extensively on the main application and costs in these circumstances are justified.

[8] In conclusion thus in terms of section 17(1)(a)(i) and (ii) of the Act I dismiss the applications for leave to appeal of the Minister, DG and Denel because the appeals would not have a reasonable prospect of success and there is no compelling reason why an appeal should be heard. The first, second and fourth applicants are to carry the costs, jointly and severally, the one paying the other to be absolved, which costs will include the costs of two counsel.

S POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 85376/2016 & 93450/2016

HEARD ON: 1 December 2017

FOR THE 1ST and 2ND APPLICANT: ADV. T. NGCUKAITOBI

ADV. HOBDEN

INSTRUCTED BY: Office of the State Attorney

FOR THE 4TH APPLICANT: ADV. A .R. BHANA SC

ADV. K. PREHMID

INSTRUCTED BY: Khampha Attorneys Inc.

FOR THE RESPONDENT: ADV. A.E. FRANKLIN SC

ADV. R.M. PEARCE

ADV. N. LUTHULI

INSTRUCTED BY: Werksmans Attorneys

DATE OF JUDGMENT: 8 December 2017

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- [1] Plascon-Evans Paints Limited v Von Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984
(3) SA 623 (A)
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