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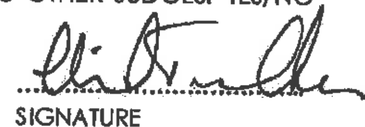
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 85376-2016 (93450-2016)

DATE: 2017-12-14

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.



DATE SIGNATURE

In the matter between

**FIREBLADE AVIATION (PTY) LIMITED** **APPLICANT**

and

**MINISTER OF HOME AFFAIRS** **RESPONDENT**

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**J U D G M E N T**

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**TUCHTEN J**: This is an appeal from a decision of Potterill J, sitting in the motion court of this division, in which she granted an application under Section 18 of the Superior Courts Act 10 of 2013 bringing into effect an order which she had granted earlier. In the same context the learned Judge refused an application for leave to appeal against her judgment. This is an appeal in respect of which the present appellants enjoy an automatic right to this court. The appeal must be heard as a matter of extreme urgency.

Section 18 has been quoted in the judgments of Potterill J and I shall not burden this judgment with repeating its terms. The main case was in essence brought to enforce an alleged decision by the then Minister of Home Affairs, Mr Gigaba, pursuant to which it was alleged that the Minister had granted an application by the applicant in the original proceedings, Fireblade Aviation (Pty) Limited, to operate a fixed based aviation operation (FBO) at a facility at the Oliver R Tambo International Airport (ORTIA).

Prior to the arising of the crucial question to be decided in this case, the applicant had operated such an FBO but only in relation to domestic travellers. The application made by the applicant was to operate an international FBO and for that purpose the applicant required the approval of a great number of state organs, including ultimately the Minister of Home Affairs, to whom I shall henceforth refer as the Minister.

The Applicant began intensively to solicit such approvals and was able to solicit the approvals of all the stake holders by January 2016. The premises in question were not owned by the Applicant, but were leased by the Applicant from Denel in terms of a lease which was ultimately formalised by a notarial lease. In that lease it was contemplated that one of the uses to which the Applicant would put the premises was an FBO.

Having secured all the permissions which were apparently regarded as necessary, the applicant arranged a meeting with the Minister and that meeting took place on 28th January 2016. The meeting was attended by a number of interested persons, including the Minister himself and his acting chief of staff, and a number of other functionaries and interested persons. At that meeting it is alleged by the applicant, the Minister told the applicant and

those present that he had decided to approve the application and that he had already signed the necessary letter, giving effect to his decision.

The meeting continued in relation to matters of general import according to the applicant, and the parties then dispersed to go their separate ways. One of the representatives of the applicant, Mr N Oppenheimer went back to his office the same day and in a letter dated 28 January 2016 he wrote to the Minister as follows:

> 'Fireblade Corporation VVIP Fixed Base Operations [FBO] – Approval for rendering of service at O R Tambo International Airport [ORTIO]
>
> Thank you very much for seeing me and my team this morning.
>
> I was delighted to be told that all outstanding matters had now been resolved and that you had signed the necessary letter to empower Fireblade to offer customs and immigration at its facility on a 3 year trial basis.
>
> I understand the need for your Department to review the operational plan of how this would work before releasing the letter, and the need to submit that plan to the Inter Agency Clearing Forum for their information.
>
> After everything we have been through, I hope this process will not take long and Mr Robbie Irons will be available to meet with your people from Monday.
>
> Once the letter has been released we would look forward to a formal function at Fireblade, and you mentioned that

we should ask the President whether he might not officiate.

That would be fantastic and I will be in touch once everything else is finalised to see how to set about issuing such an invitation.

The Applicant also embodied the two key elements of this letter in a minute which contained the recordings that the Minister had indicated that he had signed the letter, and the parties had agreed that the President would be asked to officiate, and an official at the applicant's office emailed the minute to the Acting Chief of Staff of the Department of Home Affairs, shortly after the meeting. None of that was disputed by the Department of Home Affairs or the Minister.

It was never suggested in contemporaneous correspondence that what had been recorded - as I have indicated - in either the letter of Mr Oppenheimer of 28 January 2016 or the Minute was incorrect. And indeed there matters rested for the moment. However the Department of Home Affairs received information that Denel had changed its mind on the question of agreeing to the permission to be granted to the Applicant. That prompted the Minister to write a note on an internal document which he circulated to relevant staff members.

I consider that note to be so important, that I shall read it out. That note was penned around some few days after the events of 28th January 2016 and it forms a handwritten addendum to a roneoed or typewritten document dated 5 February 2016. It reads like this:

'Forward this to DDG McKay and Thandi

1. In view of this letter obviously the letter from the acting CEO granting Denel's approval for the Fireblade must be set aside as advised by the Chair;
2. Anglo must be made aware of forthwith that the approval we granted them is also suspended until further notice pending Denel's investigations and their conclusion; and
3. Therefore the Fireblade must not be proceeded with.'

Then a further:

'3. Send a letter of acknowledgment to the Denel Chair indicating that we await their final conclusions of their investigations.'

What prompted this was that the Acting Chief Executive Officer of Denel had indicated that his organisation approved the granting of the permission to the Applicant. The letter referred to in the Minister's note was a letter from Denel itself saying that their Acting Chief Executive Officer had had no authority to take such a decision or convey such a view and that they were taking the opposite position.

There was much further correspondence between the parties, in which the Applicant complained that the permission was being withheld. There are some indications in those letters emanating from the Applicant taken by themselves that might suggest on a superficial reading that the Applicant accepted that no permission had been granted. But when one reads the letters in context it is quite clear that a distinction is being drawn between the approval in fact and the formal approval which is conveyed by

means of a letter.

When the Applicant for example wrote that the approval was expected or was asked for, what was meant that the Minister should make good his undertaking to send the written document. A crucial dispute in the court below was whether or not this version by the Applicant was of sufficient cogency to justify a finding pursuant to the procedural rule in *Plascon Evans* that a version to the contrary should be rejected on the papers.

The reason for this is that various places in the correspondence and in the affidavit of the Minister in response to this application, he denied ever having approved the application. Potterill J came to the conclusion that the Minister's denial should be rejected on the papers. Unfortunately there is no escaping the conclusion that the rejection of the Minister's version must carry with it the conclusion that the Minister has deliberately told untruths under oath.

That being the case, Potterill J concluded, after having dealt with other issues that were raised in the case, that there was no substance in the opposition of the Minister and the Department of Home Affairs to the application that the applicant had brought, and granted orders in terms of the Notice of Motion declaring that approval had been given and that effect should be given to that decision.

I might mention that there was an argument raised about a second decision that the Minister made in October 2016 where the Minister purported to refuse an application by the Applicant to establish a port of entry at ORTIO. However this application is not before us, and in my view it is of no moment, because what the Applicant seeks in the present application is a

declaration that the Minister granted the Applicant's application for the approval of an ad hoc international customs and immigration service component of a corporate fixed base aviation operation - the FBO - and not whether or not the Minister had exercised his powers correctly in declining to authorise the creation of a port of entry.

I might mention that it is common cause that the FBO is sought to be established at ORTIO and that ORTIO itself is a port of entry. There is no suggestion that it is only a designated section within ORTIO that is a port of entry. Further of relevance is the fact that there is already an FBO at the premises from which the Applicant wishes to conduct the international FBO, but the FBO that exists at present is restricted to the use of domestic travellers.

The FBO in question would seek to service the lucrative market of international travellers who arrive in private aircraft and wish to have their customs clearances and the like conducted possibly with further luxury services, not generally available at present at ORTIO, at a terminal separate from that used by the general public. These matters gave rise to several points of contention during the application.

One of these was that it was suggested that the Minister has no power to direct that an FBO be established servicing as it were rich people and not poor people, and that in awarding the rights to operate such an FBO, the principles articulated in Section 217 of the Constitution should be applied, and that a private transaction without public scrutiny would fall foul of the Constitutional provisions in Section 217.

Having regard to the fact that the issue is whether the Minister in fact

gave his permission or did not give his permission, I do not think that these questions really give rise to live issues in this case. It may be (I express no opinion one way or the other) that there are arguments to be made in this regard, but they can only be made if the Minister comes to court on a formal application saying that he has made a decision, that he considers that he has made a wrong decision and seeks to set it aside on specified grounds. That did not happen.

Instead the Minister sought to have the best of both worlds. He brought a counter-application to declare in effect that s 9A of the Immigration Act required that places of entry and exit from the Republic of South Africa be available to all persons. That is simply a restatement of the terms of the statute. I do not think, had I been the judge of first instance, that I would have considered the counter-application for a declarator of any moment, because it did not go to the root of the dispute between the parties, namely whether or not there was a decision made by the Minister and if so, whether the Minister had grounds to set it aside. In the result Potterill J omitted to deal expressly with the counter application, but I do not think that is of any moment in the context of the case.

I have mentioned that Potterill J also refused leave to the appellants to appeal against her decision. However s 18 of the Superior Courts Act provides that where an appellant (or a prospective appellant) seeks to appeal further to a higher court, the decision of the court which gave the ruling may only be brought into operation if there are exceptional circumstances and if there is irreparable harm on the side of the successful party, and in absence of irreparable harm on the side of the unsuccessful party who seeks to

appeal.

I shall deal with our decision in this regard under those three heads. I of course should have liked to take more time with this judgment and provide a written judgment, but because the Act enjoins that this appeal must be decided as a matter of extreme urgency, I consider that the provision of a written judgment with the time that would be taken for its preparation, would be inappropriate in these circumstances.

I wish to say however that we have had the benefit of full argument on both sides. We have carefully engaged with counsel throughout the debate and have considered all the points raised by them. That we do not deal with a specific point is one of those consequences that flow from an *ex tempore* judgment and is not intended to show disrespect to any of counsel's carefully thought out arguments; nor must it be suggested that anything passed us by. We considered each argument as it was raised and evaluated it on what we considered its merits.

In holding that the Applicant had established exceptional circumstances for the bringing into operation immediately the order that she had made, Potterill J referred to three elements which in her evaluation collectively constituted exceptional circumstances. We agree with what the learned judge said, and we further agree with her conclusion that each enquiry in this regard is fact driven.

The first point that the learned judge made is that she considered that there were no reasonable prospects of successful on appeal. Having regard to the correspondence and the surrounding probabilities and admitted facts surrounding the meeting of 28$^{th}$ January 2016, we agreed with Potterill

J that the Minister's denial that he had decided to grant the application and that he had embodied this in a letter which would be sent to the Applicant in due course, should be rejected as being without any foundation.

In that regard we do not deal with the matter as if it were a trial matter in which the oral evidence of the parties was before us. We are alert to the principles laid down in *Plascon Evans* and the cases that followed it, and that in effect we cannot reject the version of the Minister unless we find it to be wholly without merit, a baseless assertion that cannot be sustained. In our view this is what Potterill J found and in our view this is correct and there is no doubt that no court could come to a conclusion different from that to which the learned judge came on that point.

The surrounding correspondence and particularly the letter of Mr Oppenheimer of 26 January 2016 following the meeting, the minute that was drawn up and to place the matter beyond doubt the Minister's own manuscript memorandum show incontestably that the Minister had decided to grant the permission, and for reasons which he does not disclose, then bethought himself of his decision and wished to escape its consequences. In our view that constitutes an exceptional circumstances because the Minister is not as Potterill J correctly said, an ordinary litigant.

The Minister is bound by s 96(2)(b) of the Constitution, not to act in any way that is inconsistent with his office. He is further bound by s 165(4) of the Constitution as an organ of state to assist and protect the court to ensure its effectiveness. By telling a deliberate untruth on facts central to the decision of this case, the Minister has committed a breach of the Constitution so serious that I would characterise it as a violation.

A violation of the Constitution by a high officer in the executive, fundamental to the decision of a court case, is an exceptional circumstance. I do not say that because of the numerical prevalence or otherwise of such conduct. I say that because it is such a departure from the standards which the Constitution enjoins be applied in this country that it constitutes something exceptional. It is so important that the Minister should not be permitted to perpetuate the injustice by continuing to frustrate the Applicant in that which he himself granted to it, pending an appeal which possibly might take 1 – 2 years to finalise. Just as the Constitution in s 237 requires that all constitutional obligations must be performed diligently and without delay, so I consider that constitutional violations should be promptly remedied.

The learned Judge below further found an exceptional circumstance in that much time has elapsed since the decision was made. I do consider that she is correct. This is an exceptional circumstance; this is not something that has simply happened overnight; there was much preparation for this and money expended. It is appropriate that the injustice caused by the denial of this facility to the Applicant be promptly remedied.

The third factor which renders this question exceptional is that the grant of this application does not place a burden on the Government, the people of South Africa or any person. Indeed it acts to their benefit. It would provide a separate facility, additional to the facilities which already exist at ORTIO, which everybody agrees are running at full capacity or even over their capacity.

The finding of exceptional circumstances is not dispositive of this

application because there are then the questions of irreparable harm. The irreparable harm on the side of the applicant is contended for on the basis that the applicant has already accumulated losses in relation to its venture at the FBO of over R372 million. It has clearly done so on the basis that the lucrative component of that venture would be the international facility.

It was prepared to run the risk as all entrepreneurs must, of losing money in the hope that it would succeed in its application to obtain the necessary permissions to operate the international FBO. I might mention that privately owned FBO's are nothing novel in this country, and that they are operated at amongst other places, Lanseria Airport, without any quarrel or quibble from the authorities.

Counsel for the appellants argued that there was no evidence of irreparable harm because the applicant would be able to recoup any losses that it had made (if it were correct that the proposition was lucrative) if it won the appeal in due course. But I consider that argument to miss the point. The point is that the applicant should have enjoyed the benefits of its success in its application since January 2016. Each month that goes by where the applicant is not able to enjoy its success is a trading month lost and nothing can ever make up for that.

In my judgment irreparable harm has been established. Nor is there any substance in the suggestion that the applicant might be able to recoup its losses by way of a claim for damages, or perhaps unjust enrichment, against the authorities. Such a case would be fraught with difficulties and complicated and time consuming, and would only come to fruition many a years hence; moreover it does not meet the fundamental question which is

whether the applicant is being denied, as I have found it has been, of an opportunity to exploit its venture now.

The third proposition I have to deal with is the question of irreparable harm on the part of the Minister and or perhaps the authorities broadly described. The Minister links that harm to the personnel that must be deployed to man the immigration facilities which would be established pursuant to the order of the court below. Those immigration facilities would require the attendance from time to time of between 5 and possibly 7 officers. I think that it is idle to suggest that the deployment of such a small number of personnel would constitute irreparable harm.

In any event the applicant has made an unconditional tender to pay all expenses which might arise from the grant of the permission. That would include if extra personnel were required even the salaries of those officials. That would not be the case of the applicant's paying the salaries of the officials; that would be a case of the applicant's remunerating the Department and thus compensating it for the salaries which it would have to pay out.

There is also the question of transport. But although much was made of this, in effect it means the provision of no more than what the English call a people carrier, and what we call in this country a kombi for the transport of the relevant officials from one part of ORTIO to the FBO. In my judgment there is no substance in the suggestion that there is irreparable harm on the part of the Minister at this level.

For these reasons in my judgment the appeal cannot succeed and it is dismissed with costs, including the costs consequent upon the employment of two counsel.

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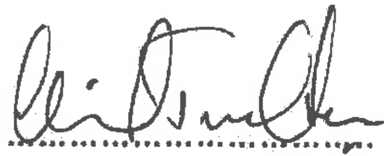

**TUCHTEN J**
**JUDGE OF THE HIGH COURT**

**Note: Kubushi J and Nkosi AJ concurred in the order granted.**