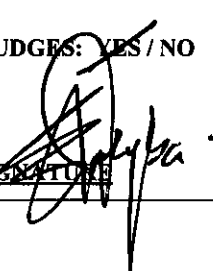


IN THE HIGH COURT OF SOUTH AFRICA /ES
(GAUTENG DIVISION, PRETORIA)

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DATE 28/11/2014	SIGNATURE 

CASE NO: 80163/2014

DATE: 28 /11/2014

IN THE MATTER BETWEEN

ULTIMATE HELI (PTY) LIMITED

APPLICANT

AND

THE CHAIRPERSON: TRANSNET NATIONAL
AUTHORITY ACQUISITION COUNCIL

1ST RESPONDENT

TRANSNET SOC LIMITED t/a TRANSNET
NATIONAL PORTS AUTHORITY

2ND RESPONDENT

DENEL AVIATION SOC LIMITED

3RD RESPONDENT

THE SOUTH AFRICAN CIVIL AVIATION
AUTHORITY

4TH RESPONDENT

THE AIR SERVICE LICENSING COUNCIL

5TH RESPONDENT

JUDGMENT

MAKGOBA J

[1] The applicant brought an urgent application against the respondents seeking an order in the following terms:

1.1 That pending the final determination of the relief sought in Part B of this application:

1.1.1 the first, second and third respondents be interdicted and restrained, with immediate effect, from in any way implementing the provisions of or in any way performing in terms of the contract concluded by the second and third respondents during or about March 2014 in relation to the provision of helicopter operations and aviation skills development services at the ports of Durban and Richards Bay under reference number TNPA540;

1.1.2 the third respondent be interdicted and restrained, with immediate effect, from rendering helicopter services, including but not limited to ship to shore services, at the ports of Durban and Richards Bay.

[2] In Part B of the notice of motion the applicant seeks the following relief:

2.1 That a declarator be issued to the effect that the provision of helicopter operation services at the ports of Durban and Richards

Bay by the third respondent, in terms of the contract concluded with the second respondent during or about March 2014 under reference number TNPA540, is illegal and in contravention of the provisions of the Air Services Licensing Act, 115 of 1990 read with the Domestic Air Services Regulations promulgated thereunder, as well as the Civil Aviation Act, 13 of 2009, read with the Civil Aviation Regulations, 2011 promulgated thereunder;

2.2 Reviewing and setting aside the decision by the first and second respondents taken on or about 4 March 2014, to award a contract to the third respondent for the provision of helicopter operations and aviation skills development services at the ports of Durban and Richards Bay under reference number TNPA540.

[3] The application is opposed by the second and third respondents.

[4] The second respondent, Transnet National Ports Authority ("TNPA") is obliged to manage the ports of Durban and Richards Bay, which includes the placing of marine pilots on incoming and outgoing vessels for purposes of guiding the vessels when entering and exiting the ports. The marine pilots are transferred onto and off the vessels by way of hoisting from helicopters. These air services were previously provided by an entity known as Archer Aviation for reward. The entity rendered the

services lawfully in that it had been issued with the necessary air service license and air operator certificate.

[5] The third respondent, Denel Aviation SOC Limited ("Denel Aviation") is obliged in terms of the contract recently awarded to it, to deliver the same helicopter services for TNPA's port-related functions at the port of Durban and the port of Richards Bay. These helicopter services primarily involve the operation and management of a fleet of three Agusta A109 helicopters for TNPA's marine pilot transfer services at the said ports. The helicopter services also include port-related functions, including search and rescue missions. Furthermore the helicopter services include the management of the basis of operation on behalf of TNPA, including the operation of hangar facilities at each port, the provision of jet A1 fuel and ensuring proper refueling of the TNPA helicopters, as well as the provision of training and skills development for TNPA personnel.

[6] The applicant's case is that the obligations performed by Denel Aviation amount to "air service" as defined in section 1 of the Air Services Licensing Act but Denel Aviation has not been issued with an air service licence as required by section 12 of the Air Services Licensing Act. Furthermore that Denel Aviation has not been issued with an air operator

certificate as contemplated in part 127 and/or 128 of the Civil Aviation Regulations, 2011 read with the Civil Aviation Act.

- [7] The applicant contends that the legislation referred to above specifically prohibits the operation of air services and the operation of a helicopter in the absence of an air service licence and an air operator certificate having been issued to the relevant party operating as such. That contravention of the said provisions amounts to criminal offences with the prescribed sanctions of fines and/or imprisonment. Furthermore the applicant contends that it was a specific contractual requirement of the Request for Proposal ("RFP") under RFP number TNPA540 pursuant to which the contract was awarded by the chairperson and the TNPA to Denel Aviation, that the service provider (Denel Aviation) should totally comply with aviation laws, health and safety and environmental requirements.
- [8] It is the applicant's further contention that Denel Aviation illegally and unlawfully competed with the applicant as well as with other bidders during the RFP process by virtue of Denel Aviation not having been issued with an air operator certificate or air services license. That the contract could not lawfully have been awarded to Denel Aviation or executed by Denel Aviation. According to the applicant Denel Aviation is committing criminal offences on a continuous basis by virtue of it

rendering an air service for reward to TNPA by way of the operation of helicopters.

- [9] The applicant avers that the said illegal conduct is persisted with despite written demand for the cessation thereof having been made, resulting in a massive risk to life and property, huge prejudice and massive potential harm to the integrity of the aviation industry in the Republic of South Africa, the integrity and reputation of the Civil Aviation Authority, the rights of the members of the public, the rights of the applicant, as well as the rights of the owners and crew members of numerous vessels that enter and exit the ports of Durban and Richards Bay on a daily basis.
- [10] It is common cause that both the applicant and Denel Aviation were the bidders in the TNPA Request for Proposals. After extensive evaluation of all bids received and adjudicated by the Divisional Acquisition Council, TNPA advised that the applicant's bid was not successful. Denel Aviation was a successful bidder and was awarded the contract. It was advised that the applicant's proposal did not meet the minimum threshold of 70 as indicated in the RFP.
- [11] The stance of TNPA with regard to the alleged illegal operation of the air services by Denel Aviation is that air services licences were not a

requirement of the RFP and that the scope of the current helicopter operations did not require an air service licence. TNPA contends that the Civil Aviation Authority ("CAA") and TNPA engage extensively in relation to the TNPA operation and that the CAA has not raised any issues in this regard.

[12] Denel Aviation admits it does not have an air service licence or an air operator certificate but states that the relevant statutes or regulations do not require it to have an air service licence or an air operator certificate to provide the services agreed under the contract. It is and was entitled in law to conclude the contract without an air service licence or an air operator certificate.

[13] The following points *in limine* and other points on the merits were raised by the respondents in opposing the granting of the interim relief sought by the applicant:

1. The applicant's failure to comply with section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");
2. The applicant's failure to comply with an internal remedy provided for in the RFP;
3. Lack of urgency;
4. The applicant's lack of *locus standi* to seek the interim relief;

5. The applicant's failure to make out a *prima facie* case for the relief sought in the review application;
6. The absence of irreparable harm or damage;
7. The balance of convenience.

[14] I proceed to deal *seriatim* with the points raised by the respondents.

Applicant's failure to comply with section 7(2) of PAJA

[15] The applicant relies on the provisions of PAJA as entitling it to the relief it seeks. Section 7(2)(a) of PAJA requires the applicant to first exhaust any internal remedy provided for in any other law before approaching a court. In terms of section 7(2)(c) of PAJA a court may, on application to it and in exceptional circumstances, exempt a person from exhausting any such internal remedy.

[16] In this matter an internal remedy does exist, namely that the applicant could and should have lodged a complaint with the Ports Regulator in terms of section 74 of the National Ports Act 12 of 2005 ("the NPA").

[17] Compliance with section 7(2)(a) of PAJA is compulsory unless a successful application is made for exemption in terms of section 7(2)(c). *In casu* the applicant did not lodge a complaint in terms of section 47 of

the NPA nor has it made an application in terms of section 7(2)(c) of PAJA for an order exempting it from doing so.

Failure to comply with a contractual internal remedy provided for in the RFP

[18] The applicant lodged its bid with the second respondent pursuant to the RFP. The RFP contained a declaration which would have been signed by the applicant. Paragraph 8 thereof provides that any dispute would first be referred to the second respondent's "Procurement Ombudsman" before any review proceedings were instituted. Such declaration constitutes a contractual undertaking by the applicant to first refer its complaints to the said Ombudsman before instituting review proceedings. This the applicant failed to do.

Lack of urgency

[19] There is a dispute of fact as to when the applicant first became aware that the third respondent was not in possession of an air service licence or an air operator certificate.

The applicant contends that it first became aware that this was the case on 10 October 2014. The third respondent contends that the applicant must have been aware that this was the case from at least January/February 2014. In terms of the "Plascon Evans Rule" this factual dispute must be

resolved on the third respondent's version. Consequently the applicant delayed unduly in bringing this application. Urgency, if any, is self-created.

[20] To establish urgency the applicant contends that Denel Aviation is allegedly committing a criminal offence with a potential for devastating consequences. It states that by virtue of the fact that Denel Aviation might not hold an air services licence or an air operator certificate, the safety requirements underlying the issue of such certificates have not been complied with and as a result incidents and accidents are inevitable. That the integrity of the regulatory bodies such as the fourth and fifth respondents are at stake and should an accident occur, there would be "international consequences".

[21] The applicant's contention in this regard does not hold water. The evidence of both second and third respondent is that the helicopters in question are currently being flown by competent and experienced pilots and there exists no reason for assuming that should they continue to do so, a disaster might occur. This much has been conceded by the applicant in its replying affidavit where it stated that "The applicant does not contend that any of the pilots are not duly qualified or licensed."

[22] The applicant has accordingly failed to establish the urgency of this application on the grounds or basis alleged by it in its affidavits.

Applicant's lack of *locus standi*

[23] The interim relief sought in this matter is an interdict pending the outcome of the review proceedings. The applicant contends that it is entitled to interdict the continued provision of the helicopter pilots by Denel Aviation by reason that by so doing Denel Aviation is breaching the provisions of the Air Services Licensing Act 115 of 1990 and the regulations promulgated thereunder. This, it contends, amount to criminal conduct and therefore it (the applicant) has the right to apply to court to prevent this illegal activity.

[24] The Air Services Licensing Act and the regulations were enacted and promulgated for the benefit of the general public and not specifically for a class of persons of which the applicant is a member. That being the case, the applicant can only have *locus standi* to seek an interim interdict if it can show that it is suffering, or will in future suffer damage if the third respondent (Denel Aviation) continues to provide the services it does to the second respondent.

See: **Laskey and Another v Showzone CC and Others 2007(2) SA 48 (C) at par [13].**

- [25] It is not enough for the applicant to contend that the harm caused by Denel Aviation would harm the general public. If the applicant's concern is that the harm which Denel Aviation's conduct might cause will affect the public, then it has an alternative remedy, and that remedy is simply to lay appropriate criminal charges.

See: **MEC for Health, Mpumalanga v M-Net and Another 2002(6) SA 714 (T) at page 722.**

- [26] The applicant has failed, therefore, to show that it has *locus standi* to seek the interim relief which it does.

No *prima facie* case made out

- [27] The applicant's entire case is posited on the contention that the third respondent requires an air services licence and an air operator certificate in order to lawfully render the services which it does to the second respondent. At the heart of the application for interim relief (Part A) lies a simple legal question, ie does the service rendered by Denel Aviation to TNPA amount to an air service as defined in the Air Services Licensing Act?

- [28] Air service is defined in section 1 of the Act. It defines "air service" to mean "any service operated by means of an aircraft for reward".
- [29] *In casu* Denel Aviation does not provide a service by means of an aircraft. It provides helicopter pilots (who do have pilot licences), crew and ground staff to fly and operate helicopters owned by TNPA.
- [30] When the Air Services Licensing Act refers to "air services licence", it does not cover the services rendered by Denel Aviation to TNPA. This is because it is the owner of the helicopters (ie TNPA) that is required by statute to possess the air service licence. It is not the applicant's case that TNPA requires a licence. That is because TNPA does not offer a service for reward. Its helicopters are used by itself for internal operations to ensure that marine pilots are safely hoisted and lowered from or onto ships.
- [31] An operator required to have an air operator certificate must be an operator of an air service as defined in section 1 of the Act. Denel Aviation does not supply or maintain the helicopters. What the third respondent (Denel Aviation) does is provide personnel for the operation of the second respondent's helicopters. It does not actually "operate" the

aircraft itself. The third respondent's personnel fly the aircraft under the directions and control of the second respondent.

- [32] It is the second respondent which exercises managerial and technical control over the air services. All the third respondent does is supply the pilot, crew and certain subsidiary services.

In the case of **Inter Aviation Services (Pty) Ltd v Chairman International Air Services Council 2002(6) SA 51 (T)** it was held that a person or entity operating air service is a person who exercises financial, managerial and technical control over air service in question. Put differently, a person who supplies aircraft and crew and some subsidiary services is not necessarily a person operating air service.

- [33] Accordingly the applicant has failed to show that it has a *prima facie* cause of action.

No irreparable harm or damage

- [34] As pointed out when dealing with *locus standi*, the applicant has not shown that it will suffer any harm or damage if interim relief is not granted.

To the extent that the applicant contends that harm or damage may be done to the general public, it has been shown by the respondents that the


helicopters are being flown by qualified and experienced pilots. There is, therefore, no reasonable apprehension of harm being caused to the general public if the interdict is not granted.

- [35] The applicant has not even shown on a *prima facie* basis that, but for the decision it seeks to review, it would have won the tender and therefore not lost any revenue.

Balance of convenience

- [36] An applicant for an interdict must show that the balance of convenience favours it. In exercising its discretion the court decides the balance of convenience by comparing the prejudice to applicant if the interdict is withheld, against the prejudice to respondents if it is granted.
- [37] The applicant suggests that the second respondent could secure services of another operator if the interim interdict is granted. There is no evidence to show that there are other operators available who could at short notice provide the services which the third respondent currently provides the second respondent. On the other hand the second respondent has pointed out that the granting of interim relief would severely impact the working of the ports of Durban and Richards Bay. This in turn would adversely affect the economy of the country.

[39] In the result the application is dismissed with costs, such costs to include the costs of two counsel where employed.


M. MAKGOBA

EM MAKGOBA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

80163-2014

HEARD ON: 18 NOVEMBER 2014
FOR THE APPLICANT: J G WASSERMAN SC AND E KROMHOUT
INSTRUCTED BY: TERRY MAHON ATTORNEYS
c/o JACOBSON & LEVY INC
FOR THE 2ND RESPONDENT: C J PAMMENTER SC AND C A NEL
INSTRUCTED BY: WOODHEAD BIGBY INC
c/o DYASON INCORPORATED
FOR THE 3RD RESPONDENT: L SISILANA
INSTRUCTED BY: BOWMAN GILFILLAN INC
c/o GELDENHUYS MALATJI