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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

26/05/16
DATE

SIGNATURE

CASE NO: 73600/2013

2/6/2016

In the matter between:

AIR LINE PILOTS' ASSOCIATION OF SOUTH AFRICA	1st Applicant
THEUNIS LOUISE ZERWICK	2nd Applicant

and

POPPY KHOZA N.O.	1st Respondent
GAWIE BESTBIER N.O.	2nd Respondent
THORNDIKE THABANG PHAHLANE N.O.	3rd Respondent
SOUTH AFRICAN CIVIL AVIATION AUTHORITY	4th Respondent
THE MINISTER OF TRANSPORT	5th Respondent

JUDGMENT

Baqwa J

Administrative Law *– Administrative action – Grounds – No room for rescission where functionary imposes a penalty prescribed by law – Where the offence is admitted – Functionary merely exercising a statutory function which is not an exercise of a discretion – Confirmation and endorsement of same cannot be said to be unfair or capricious where respondents given notices and they fail to make representations*

Summary

This is a review application of certain decisions which were taken by the respondents subsequent to a runway incursion incident on 14 October 2013 at OR Tambo airport. As a result of the said incident the third respondent who was an enforcement officer of the South African Civil Aviation Authority had issued an enforcement notice in terms of which the second applicant was notified that he had committed an offence in terms of the regulations promulgated under the Civil Aviation Act, 13 of 2009.

A penalty of R10 000.00 was imposed as a result of the said offence. The first respondent had after receiving a report from the third respondent endorsed and confirmed the third respondent's decision. The second respondent had in the absence of the first respondent conveyed the decision to the second applicant. The latter was a member of the first applicant and jointly, they brought this application for review against the three respondents.

Held, that as against the first respondent it had not been proved that she had not properly considered the report received from the third respondent.

Held, that as against the second respondent that he merely conveyed the first respondent's decision to the second applicant on the prescribed form. He had not taken any decision and there was therefore no decision to be reviewed as far as he was concerned.

Held, as against the third respondent that he had taken the decision to issue an enforcement notice and impose a penalty as prescribed in the regulations promulgated in terms of the Civil Aviation Act.

Held, as against all the respondents that they had neither acted unfairly, capriciously, nor had they been motivated by irrelevant considerations or committed an error in law in contravention of the Promotion of Administrative Justice Act 3 of 2000.

Held, therefore, that the application for review stands to be dismissed with costs.

Annotations:

Unreported Cases

Opposition to Urban Tolling Alliance and Others v The South African Roads Agency Limited and Others case number (90/2013) [2013] ZASCA 148 (9 October 2013)

Reported cases

MEC for Environmental Affairs and Development v Clairison's CC 2013 (6) SA 235 SCA at 239 – 240

Lester v Ndlambe Municipality (514/212) [2013] ZASA 95 (22 August 2013)

Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others [2014] ZACC 36

Statutes

The Civil Aviation Act 13 of 2009

The Promotion of Administrative Justice Act 3 of 2000

[1] This is a review application in which the applicants seek an order in terms of which the decisions by the third respondent, Thorndike Thabang Phahlane in his capacity as an enforcement officer on 31 January 2013 whereby he fined and issued the second applicant a penalty notice for payment of R10 000.00; by the first respondent, Poppy Khoza in her capacity as the Acting Director of Civil Aviation, on 12 March 2013 whereby she confirmed the penalty fee of R10 000.00 against the second applicant; the second respondent, Gawie Bestbier, in his capacity as the Acting Director of Civil Aviation, on 19 March 2013 whereby he delivered a final decision and confirmed that the second applicant should pay R10 000.00 be reviewed and set aside.

The Parties

[2] The first applicant is the Airline Pilots Association of South Africa ("*ALPA SA*") a body corporate and trade union acting in this application on behalf of its body of members, which membership includes the second applicant. The primary objectives of ALPA SA are to promote the highest standard of flight safety in the aviation industry and to promote the interests and welfare of its members.

[3] The fourth respondent is the South African Civil Aviation Authority ("*SACAA*") a juristic person established in terms of Section 71 of the Civil Aviation Act 13 of 2009 ("*The Act*") whilst the fifth respondent is the Minister of Transport in the cabinet of the Republic of South Africa.

The Background

[4] The second applicant was a captain in command of Boeing 737 aircraft on 14 October 2012. The aircraft had a call sign or identification number CAW 215 with Ms Delport as his co-pilot.

[5] CAW 215 was taxiing on taxiway Bravo (B) whilst Ms Delport acting under command of the second applicant conducted a radio telecommunication with Air Traffic and Navigation Services (ATNS) controllers.

[6] During the said communication CAW 215 was instructed by the ATNS to give way to Airbus 546 and thereafter instructed to give way to Aircraft C 208.

[7] Three to four aircraft were lined up in front of CAW 215 in line for take-off, namely SAA 323, SAA 222, SAA 405 and Botswana 212 awaiting instructions prior to take-off.

[8] It is the applicants' contention that a line up instruction means that an aircraft can await its turn in the line and should proceed, in turn, after take-off by the aircraft ahead of it, to the runway to take-off without any further instruction or authorisation by ATNS.

[9] On the contrary, the respondents contend that the procedure is that each time an aircraft has to move from a stationary position it requires the authorisation of the ATNS and that that is the position particularly at OR Tambo airport which is the busiest airport in the country with aircraft movement at any and every conceivable moment.

The Incursion

[10] The crew of CAW 215 were under the impression that they had been given the "*line up and wait*" instruction similar to, and simultaneously, with other aircraft ahead of them and in accordance with that understanding they followed the aircraft lining up ahead of them at the intersection.

[11] In between the aforesaid communications and manoeuvres, the ATNS cleared the Botswana (BOT 212) flight to take-off whereafter CAW 215 lined up across holding point 2 at 03 L. At that point the ATNS requested the crew to confirm that they had been given a line up clearance. The co-pilot, Ms Delport, responded to the effect that they thought they had been given a clearance whereupon the operator from ATNS replied that she did not think so. She nevertheless proceeded to give an instruction to CAW 215 to line up in runway 03 L and stand by for departure.

Steps taken by the Respondents

[12] Upon receiving a report from the ATNS about the incident the third respondent conducted an investigation and in the process obtained ATNS voice recordings.

[13] Subsequently, on 5 December 2012 the third respondent issued and served the second applicant with a Notice of Intended Enforcement Action in terms of Regulation 185.00.3 (a) of the Civil Aviation Regulations, 2011 (CAR). In terms of that notice the second applicant was notified that the third respondent intended to carry out an investigation as to whether the second applicant had committed an offence in terms of Regulation 185.00.1 (1)(f) of the CAR namely – "*any person who does or causes, any act contrary to or who fails to comply with, any provision of the regulations, or a direction given or a prohibition made or a condition imposed in terms thereof shall be guilty of an offence.*"

[14] The notice further informs the second applicant that "*It is alleged that on 14/10/2012, you were the pilot in command of ZS.OKC, and you lined up the aircraft on the runway without aircraft clearance. Therefore you have violated the Civil Aviation regulations. We have in our possession the following:*

- *ATNS voice recordings*
- *The incident report from ATNS.*

This will be used in the investigation."

[15] The notice further invites the second applicant to submit, or cause to be delivered, his representations concerning the allegations against him in person or through legal assistance, in writing, to the Director of Civil Aviation (DCA) within thirty (30) days of receipt of the notice and that such representations may include evidence to show that he did not commit the alleged offence.

[16] The second applicant responded to the notice on 5 December 2012 and confirmed receipt thereof. He stated further that they had filed an air safety report and wanted to reiterate that they had C 208 lined up on "*E*" intersection as well as aircraft crossing runway 03L on "*L*' visual.

[17] No further representations were received form the second applicant and on 31 January 2013 the third respondent took a decision to impose an administrative penalty against the second applicant in terms of Regulation 185.00.3 of the CAR, 2011. The second applicant was then issued with a penalty notice on 31 January 2013.

[18] In the notice he was advised that he had to pay the penalty amount, namely, ten thousand rands (R10 000.00) to the Director of the Civil Aviation Authority within thirty days of receipt of the Penalty Notice and that he had the right of appeal to the Director within fourteen days of the notice.

[19] The first applicant representing the second applicant lodged an appeal against the penalty notice on 12 February 2013.

[20] The third respondent addressed a memorandum to the first respondent in which he makes reference to the applicant's appeal and annexes a copy thereof. In the memorandum, the third respondent addresses the applicant's grounds of appeal in terms of Regulation 185.00.0 (13) and (20) of CAR 2011, and also submits the ATNS report to the first respondent.

[21] The first respondent considered the documents submitted and thereafter confirmed the penalty fee of ten thousand rand (R10 000.00) issued against the second applicant.

[22] On 19 March 2013, the second respondent who was then the Acting Director (CAA) and in the absence of the first respondent communicated the decision of the first respondent in the prescribed form to the second applicant.

[23] Subsequently the respondents were served with an application in which the applicants seek to review and set aside the decisions referred to in the Notice of Motion.

[24] The application is opposed by the respondents and in their opposition they have raised a point in **limine**, namely, that the applicants are time barred from bringing the application in terms of Section 7 (1) of The Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"), or what has become known as the delay rule.

[25] The delay rule is dealt with in numerous decisions in other courts but for purposes of this case I merely wish to refer briefly to what was said in the unreported decision of **Opposition to Urban Tolling Alliance and Others v The South African Roads Agency Limited and Others** case number (90/2013) [2013] ZASCA 148 (9 October 2013) paras 23 – 24

> "*[23] Although the delay rule has its origin in common law, it now finds it has basis in Section 7(1) of PAJA which provides in relevant part:*
>
> > "*1. Any proceedings for judicial review in terms of Section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –*
> > *(a) ....*
> > *(b) .... on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons*"
>
> *[24] Section 9 (1) provides, however, that the 180 day period 'may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal, on application by the person or administrator concerned'. Section 9 (2) provides that such an application may be granted 'where the interests of justice so require.'*"

[26] The applicants deny being in contravention of the delay rule or alternatively claim that if there was a delay, it was caused by the failure of the respondents to furnish them with a record of proceedings to enable them to exhaust their internal remedies in terms of Section 120 of the Act.

[27] At paragraph 25 of the applicants' founding affidavit, they state as follows:

> "25. *In order not to delay the matter any further and comply with the period of 180 days provided for in Section 7 of PAJA, the applicants resolved to commence with the review proceedings. The Honourable Court is, accordingly, respectfully requested to exercise its discretion to exempt the applicants form the obligation to exhaust any internal remedy, in the interests of justice, alternatively to extend the time limits prescribed in Section 7 of the PAJA, in accordance with the provisions of Section 7 (2)(a) and (c) of the PAJA.*"

[28] The respondents deny that the applicants requested a record of proceedings and they submit that when the applicant lodged an appeal to the first respondent which was decided on 12 March 2013, they had exhausted their internal remedies and had no further remedy under Section 120 of the Act.

[29] I have considered the point raised in **limine** concerning the delay and in light of the background to the case I am of the view that in the interests of justice the applicants ought not to be barred from proceeding with the application on the merits. Barring them would be shutting the door in their face and preventing them from pursuing their rights on technical grounds where circumstances and facts do not justify such a course of action.

Oral Evidence

[30] Even though there is a recording of the radio communication between ATNS and CAW 215 which was recorded on the day of the incident in question, the parties agreed that the applicants could present oral evidence in that regard only. I permitted the tendering of that evidence as I considered it in the interests of justice to do so.

[31] The applicants tendered the evidence of Captain Mario Santos who is also the deponent to both the applicant's founding affidavit and replying affidavit. His evidence constituted a clarification and an elaboration of the ATNS transcript which is already part of the applicants' documentation and I do not propose to repeat it in this judgement.

[32] He was cross examined by Advocate Matebese on behalf of the respondents and during cross examination he conceded that the procedure is that every time an aircraft has to move from a stationary position it requires the authorisation and go ahead from Air Traffic Control and that CAW 215 did not obtain such authorisation before entering runway 03 L.

[33] Summarised, the basis for application for review is as follows. The applicants submit that mandatory procedure and conditions prescribed by CAR in terms of the Act were not complied with and that the actions of the respondents were therefore procedurally unfair or materially influenced by an error of law. They further contend that the decisions taken were based on irrelevant considerations or were taken because relevant considerations were not considered. Lastly they contend that the decisions are not rationally connected to the information before the first to third respondents and to reasons given for the decisions by the first and second respondents.

[34] In his memorandum to the first respondent in support of his decision to impose the penalty, the third respondent states, **inter alia**, as follows:

"*Taking all his experience and level of training, a higher level of compliance is expected from him.*"

The applicants submit that this manifestly indicates that his decision was materially influenced by an error of law in that he applied a higher standard in his assessment than was required in the circumstances.

[35] The applicants further contend that the third respondent made use of the ATNS recordings of the communications between the air traffic controllers and the crew of CAW 215 whilst being aware of the provisions of Section 54 (2) of the Act which provide as follows:

"*54(1) ....*

(2) A communication record obtained under this Act must not be used against any person referred to in Section 57 in any legal or disciplinary proceedings."

[36] They also contend that he failed to take into consideration the concept of Just Culture which is accepted and subscribed to by the international aviation industry and that South Africa is a member state of the International Civil Aviation Organisation ("*ICAO*") and a signatory to the Chicago Convention of 1944.

[37] 'Just Culture" has been described as "*An atmosphere of trust in which people are encouraged (even rewarded) for providing essential safety-related information, but in which they are also clear about where the line must be drawn between acceptable and unacceptable behaviour.*"
See **Manual on the Prevention of Runway Incursion**, 1st Edition – 2007 (approved and adopted by ICAO)

The Law

[38] PAJA, which is the legislation enacted to give effect to the right to just administrative action ensures a close scrutiny of administrative decisions. It does not, however empower the courts to substitute their own opinion in place of those administrative decisions. It is not required that a decision of an administrative body be perfect or, in the court's estimation, be the best decision on the facts.
See **Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others** [2014] ZACC 36 para 78.

[39] The courts ought to treat the decisions of administrative bodies with appropriate respect and give due weight to findings made by those with special expertise and experience. This application is a case in point as it also deals with issues of Aviation Safety and Control.
See **Bapedi Marota Mamone (supra)** at paras 79 – 80.

[40] In review proceedings, the court is less concerned with the decision by a functionary but with whether the functionary has performed the function with which it was entrusted by following the correct procedures and executed its function in a fair manner.

[41] When a functionary is entrusted with a discretion it means that the law gives recognition to the evaluation by a functionary to whom the decision is entrusted and it is not open to a court to second guess his evaluation. In the matter of **MEC for Environmental Affairs and Development v Clairison's CC** 2013 (6) SA 235 SCA at 239 – 240 para 18, the Court stated as follows:

> *"[18] We think it apparent from the extracts from her judgment we have recited, and the judgment read as a whole, that the learned judge blurred the distinction between an appeal and a review. It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. Clearly the court below, echoing what was said by Clairisons, was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted."*

[42] The weight to be attached to particular facts and how for a particular fact affects the eventual determination of the issue, is a matter for the functionary to decide as long as he acts in good faith and in a reasonable and rational manner. In those circumstances, a court of law ought not to interfere.
See **Clairson's CC (supra)** at para 22.

[43] When a statute has declared that a particular act constitutes an offence, an administrator tasked with the administration of the said statute and regulations promulgated thereunder is under an obligation to enforce the provisions of the statute and is not afforded any discretion in that regard. This is to ensure that an on-going illegality is curbed and to uphold the rule of law. This principle was enunciated further in **Lester v Ndlambe Municipality** (514/212) [2013] ZASA 95 (22 August 2013) paras 23 – 26 as follows:

"*[26] Local government, like all other organs of state, has to exercise its powers within the bounds determined by the law and such powers are subject to constitutional scrutiny, including a review for legality. In Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) 20 the court expounded on the doctrine of legality as an essential component of the rule of law as follows:*

> *"These provisions [ie ss 174(3) and 175(4) of the Constitution] imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law."*

The power to approach a court for a demolition order in s 21 is unquestionably a public power bestowed upon local authorities. As such, its exercise must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, as stated, is inextricably linked to the rule of law. See AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another where the court held as follows:

"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law."

In National Director of Public Prosecutions v Zuma23 Harms DP emphasized that the courts are similarly constrained by the doctrine of legality, ie to exercise only those powers bestowed upon them by the law.24 The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the court below was constrained by that doctrine to enforce the law by issuing a demolition order once the jurisdictional facts for such an order were found to exist."

Evaluation

[44] After consideration of the admissions made by the applicants regarding the incident on 14 October 2012 and the evidence of Captain Mario Santos – it is quite evident that the conduct of the second applicant constitutes an offence in terms of Regulation 185.00.1 (1)(f) read with Regulation 91.06.18 (1) of the CAR 2011. The third respondent exercised no discretion in this regard. The second applicant was then issued with a penalty notice on 31 January 2013. The second applicant was served with the notice and given an opportunity to make representations. This constituted an application of the **audi alteram** principle in regard to the second applicant who was also informed about information the third respondent had in his possession. It is therefore evident from the enforcement notice itself that the third respondent not only assessed the evidence but also that he verified it by utilising other available information.

[45] In my view, the memorandum submitted by the third respondent explains the basis on which he came to his decision to issue the notice against the second applicant. The penalty is prescribed by law and the third respondent exercised no discretion in that regard. The R10 000.00 penalty is the minimum penalty prescribed in the CAR for a person who commits an offence for the first time.

[46] According to the evidence tendered by Captain Mario Santos the Just Culture Principles are utilised, **inter alia**, as a tool for managing errors by aviation personnel who are encouraged to report those errors without expecting punitive action against themselves. The result is that in the long term, risk management is enhanced utilising real life experiences. **In casu**, the challenge faced by the applicants has been, as submitted by the respondents and conceded by the applicants that these principles have not yet been incorporated into the CAR. The fourth respondent is a creature of Statute and it must act within the confines of the statute and regulations within which it is created. If this is accepted it cannot be validly contended that the respondents ignored relevant considerations when it ignored the 'Just Culture' principles when they decided the issues concerning the second applicant.

[47] The applicant also contended that the third applicant was procedurally unfair and in contravention of Section 54 of the Act in that he made use of the ATNS recordings of the communication between the air traffic controllers and aircraft members of CAW 215 which is prohibited by Section 54 during the conduct of their investigation.

[48] It is contended by the respondents and conceded by the applicants that the provisions of Section 54 had not yet been promulgated at the time of the incursion and were therefore of no application. Section 54 was therefore not a relevant consideration to be considered by any of the respondents and failure to take it into consideration is neither an irregularity nor an error of law.

[49] The decision by the first respondent confirming the third respondent's decision was taken 12 March 2013. The first respondent was the person who had the legal authority to do the confirmation.

[50] The applicants contend that on 19 March 2013 the second respondent recorded his final decision under his signature and in his purported capacity as the acting director of Civil Aviation, he confirmed the penalty notice that the second applicant should pay R10 000.00 as stipulated in the penalty notice dated 31 January 2013. This is denied by the respondents who contend that what the second respondent did was to communicate a decision that was taken by the first respondent on 12 March 2013 by using a form that is prescribed by regulations. He did this in the absence of the first respondent.

[51] It is common cause that the first respondent was the person to whom the third respondent reported to at the time the notice was issued. It therefore does not make any sense not only on the facts presented but also on a common sense basis that the second respondent would usurp the authority of the first respondent and purport to confirm the decision of the third respondent when he had no authority to do so. On a balance of probabilities therefore, I accept that the position contended for by the respondents is the correct one, namely, that he merely acted as a conduit for the first respondent in conveying the decision of the first respondent on the prescribed form to the second applicant. I accordingly find that there was no decision taken by the second respondent. The format used by the second respondent is the format usually utilised in couching decisions made in a legal context.

[52] The applicants also submit that the decision of the first respondent dated 12 March 2013 is reviewable regard being had to the reasons given by the first respondent on 3 June 2013. They submit that her reasons constitute a repetition of the contents of the report by the third respondent in his memorandum dated 20 February 2013 which follows the principle that the responsibility for the exercise of discretionary power rests with the authorised body and no one else.

[53] As has already been alluded to, it is common cause that an offence has been committed in terms of the regulations. The commission of the offence has been evaluated in terms of the available evidence, more particularly the ATNS record. That evidence had not been disputed when an opportunity was availed to the second applicant to make representations. Subsequently the third respondent had presented his memorandum to the first respondent who appeared to agree with the contents thereof. The exercise of discretionary power would have meant that the first respondent would have either rejected or accepted the third respondent's report. One could imagine that she could have also called for further information had she deemed that necessary. It so happens that in the present case she accepted the third respondent's report. It may be that the applicants do not agree with the weight that the first respondent accorded to the evidence received from the third respondent but that can hardly be the basis upon which this court is called upon to review the decision of the first respondent.

[54] In the circumstances I find that the respondents' version is consistent with the proven facts and the probabilities of this case.

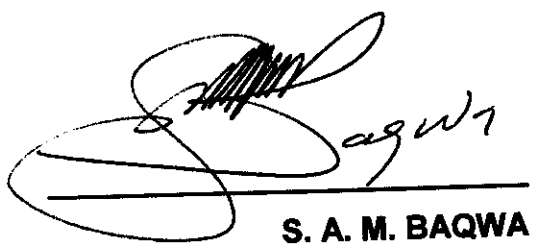
[55] More specifically I find that the actions of the third respondent were in accordance with the provisions of the Act and the regulations prescribed thereunder. I further find that no decision was taken by the second respondent who only communicated a decision that had already been taken by the first respondent using the prescribed form in terms of the regulations. Lastly I find that there was no improper exercise of her discretion by the first respondent.

[56] The fifth respondent filed a Notice to Abide the decision of this court.

[57] In the result I find that there is no reviewable administrative action as defined in Section 1 of The Promotion of Administrative Justice Act 3 of 2000.

[58] I accordingly make the following order:

The application is dismissed with costs.



S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of Hearing:	3 & 4 May 2016
Date of Judgment:	2 June 2016
For the Applicant:	Advocate Sieberhagen
Instructed by:	Bouwers (Roodepoort) Inc.
For the Respondents:	Advocate Matebese
Instructed by:	Mchunu Attorney