

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION PRETORIA**

**CASE NUMBER: 82812/14**

16/9/2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:-

**GERHARD JORDAAN**

Plaintiff

and

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

1<sup>st</sup> Defendant

**THE EXECUTIVE AUTHORITY OF THE DEPARTMENT OF  
HOME AFFAIRS OF THE NATIONAL GOVERNMENT OF THE  
REPUBLIC OF SOUTH AFRICA, REPRESENTED BY THE  
MINISTER OF HOME AFFAIRS N.O**

2<sup>nd</sup> Defendant

**THE EXECUTIVE AUTHORITY OF THE DEPARTMENT OF  
TRANSPORT OF THE NATIONAL GOVERNMENT OF THE  
REPUBLIC OF SOUTH AFRICA, REPRESENTED BY THE  
MINISTER OF TRANSPORT N.O**

3<sup>rd</sup> Defendant

**SOUTH AFRICAN AIRWAYS (PTY) LTD**

4<sup>th</sup> Defendant

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**JUDGEMENT**

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**NKOSI: AJ**

**INTRODUCTION**

[1] The Plaintiff initially instituted this action against five Defendants whose details appear on the heading above. Subsequently he withdrew his action against the first, third, fourth and fifth Defendants. This action is therefore against the Second Defendant only. ("the defendant")

[2] The parties reached an agreement before the commencement of the trial that the matter would proceed only in respect of the issue of liability. They both requested that the issue of quantum be postponed *sine die*. The matter was set down for trial over a period of three days. The Plaintiff himself testified and called one witness to testify on his behalf. On the other hand, three witnesses testified for the defendant.

**THE FACTS IN BRIEF**

[3] The Plaintiff testified briefly that:-

3.1. He is an adult married male and a South African citizen. He is a holder of a valid South African Passport No. [...] issued by the Defendant. The passport was issued on the 14 May 2009 and will expire on the 13 May 2019. The copies of the extracts from his passport appear in bundle "D" pages 32 - 68.

3.2. On the 2nd September 2007 he and his wife boarded an aeroplane from Bloemfontein to OR Tambo airport. Their flight was delayed and only arrived at OR Tambo Airport at about 18h00. He was supposed to board a South African Airways ("SAA") flight at OR Tambo Airport and fly to Oslo, the departure time

was 20h20 that evening. At Oslo he was to board a connecting flight to Longyearbyern in order to catch the ship to Arctic. This was a trip of his lifetime and was over a period of two weeks.

3.3. He was travelling with his wife and two other couples. All in all they were a group of six people. Upon arrival at OR Tambo Airport, he and his wife proceeded to SAA counter number B36 to get their boarding tickets. His wife was assisted and obtained her Boarding Pass without any glitches. However he experienced serious problems which are the subject of the case before this court.

3.4. He furnished his passport to a SAA official identified as Keletso. The said official's system could not issue a boarding pass, it indicated that there was a problem and that the office of the Department of Home affairs ("DHA") should be contacted. This first attempt to issue a boarding pass took place at approximately 18h45 whereas the plaintiff's flight was due to depart at 20h20.

3.5. The said Keletso eventually sought assistance from her senior, Mr Monyamane who also did not succeed to have the boarding pass issued to the plaintiff in time. The flight left without the plaintiff. His wife opted to remain behind, in support of her husband.

3.6. He conceded that the override code was issued by the DHA at 19h50 as indicated on page 70 of Bundle "F". It was put to him that the airline agent, Keletso had punched in the override code incorrectly in that she used the airline override system instead of that of the DHA. He could not deny as he had no knowledge of that. He also did not know whether the DHA or the SAA were the cause for the delay in issuing the boarding pass.

[4] Mr Sello Eric Monyamane was thereafter called to testify for the Plaintiff. He testified briefly that:-

4.1. He is employed by the SAA as an operations manager since the year 2000.

4.2. He is aware of the letter dated 3 September 2011 on SAA letterhead. He authorised the letter to be typed and handed to the Plaintiff. The letter is on page 69 of "Bundle D". The said letter reads as follows:

*"This is to confirm that Mr Gerhard Jordan holding a South African Passport, date of birth [...] 1957, with the number [...] expiring on the 13th*

*May 2019, had problems when checking in. The APP was not going through and we reverted to contacting the Department of Home Affairs (DHA) to assist with the problem. Several attempts were made by the airline representative to try to get hold of DHA using the contact details 012 810 7670 / 701716343, the cell number 083 927 7366 but when we eventually got through to someone it was already too late for passenger acceptance hence Mr and Mrs Jordan didn't fly SA264102 Sep 2011.*

- 4.3. He was on duty on the 2<sup>nd</sup> September 2011 when Keletso requested his assistance at SAA counter B36. He discovered that the Advance Passenger Processing ("APP") system would not allow the Plaintiff to be boarded on the flight to Oslo. He called DHA and was given an overriding code. He gave this code to Keletso's team leader to punch in. The code did not work. When they managed to punch it successfully, it was too late for the Plaintiff to Board the flight. They had previously experienced similar problems with the APP system notwithstanding the fact that their airline staff received training about the use of this system.

He did everything in Plaintiff's presence so that the Plaintiff would not think that the problem was with SAA. He could not print the Boarding Pass because the APP system would not allow him to do so. He thereafter offered to compensate the Plaintiff out of courtesy by booking him into the next flight and upgrading his ticket into business class. He did not print out the Boarding Pass ticket as it was too late to do so. He can't remember what time was the override code received which cleared the error for the Boarding Pass ticket to be issued but he recalls that the boarding gates were already closed. He also does not remember what time was the first attempt made using the override code to get the Boarding Pass issued by the system.

- 4.4. He further testified under cross examination that there was nothing wrong with the passport. The problem was with the APP system. When the problem was finally resolved, it was less than 20 minutes to boarding time. He conceded that the override code was given at 19:50:33 by the DHA. He does not know why the DHA system still reflected "Do not Board". He was referred to page 72 of Bundle "F" where the document states "Error 6082 inappropriate override code" and it was put to him that the reason for the error is because the airline override code was used and that it was incorrect to use it. He replied that he did not know that.

It was further put to him that the Government override code should have been used, he replied yes. He maintained his position that the problem was not human error but the APP system because there were many other passengers who experienced similar problems during that period. That concluded evidence for the plaintiff. Ms Keletso was not called to testify.

[5] Mr Nicholus Smith testified for the Defendant. He is employed by the DHA since year 2009 at the Information Technology Section responsible for the passport system. In 2009, the DHA released a new passport system known as the APP to improve its previous system. This was done in preparation for the 2010 World Cup hosted by the Republic of South Africa. In the process information of some passports was not correctly captured into the database system of the DHA. In Plaintiff's situation, the expiry date of his passport was a day prior to the date of issue of his passport. Clearly that was incorrect.

[6] In the event of such problem being encountered, the airline agent must contact the DHA telephonically and the DHA official would then issue an override code generated by its system. When cross examined, he conceded that it was the record in the system which was incorrect in that it did not match the hard copy of the passport. There was nothing wrong with the hard copy of the Plaintiff's passport. He confirmed that the DHA is the custodian of the APP system. The override code is generated by DHA. The problem with the system was rectified in November 2011.

[7] The next Defendant's witness was Ms Elna Bates. She is employed by the DHA for the past 28 years in the Immigration Services Department. Her task is to assist the airline when they experience problems. Her department issues override codes. It is her colleague who issued the override code in Plaintiff's case. Her evidence was mainly about the date when the APP system was introduced and its maintenance. She also corroborated Mr Smith's evidence concerning the process involved in obtaining the override code. The DHA has established an operational centre (OC) which is operational 24 hours around the clock. There is always a DHA agent on standby to receive airline requests for assistance with the APP related queries

[8] Mr Collin Gelderblomu was the last witness for the Defendant. He is employed by

DHA for the past 30 years. His duties are to run the Department's movement control system as part of the Immigration system. He is at the business side and not on the Information Technology side. He is involved in the development of new systems. He knows about the Plaintiff's incident of the 2nd September 2011. He was on duty at that time and was responsible to furnish airlines with a systems generated override code. On the day in question, he is the one who furnished the airline agent with the override code at 19h50. The APP system is able to identify the nature of the problem long before the airline agent contacts him for an override code. However he is unable to contact the airline agent telephonically to assist in resolving the problem because the APP system does not indicate the details of the airline agent and he would not know which agent to call. He gave the override code to the airline agent at 19:50:33. From the time he received the call from the airline agent, the system took about a minute to generate the override code. He never received any other calls from the SAA airline agent except the one at approximately 19h50.

### **THE ISSUE IN DISPUTE**

[9] It was submitted by both counsels, to whom I am indebted, that the only issue to be decided upon is that of *culpa*. The allegations of various acts of negligence on the part of the defendant are contained in paragraph 12 of the particulars of claim.

[10] These allegations of negligence can be classified into three separate categories. Firstly, it is common cause that there was a defect relating to plaintiff's passport as on 2 September 2011 which defect the defendant was aware of. The question therefore is whether such defect caused the plaintiff to miss his flight. Secondly, it is also common cause that the override code was issued at 19h50 by the defendant whereas the flight was due to depart at 20h20. I have to determine whether the defendant failed to assist the plaintiff timeously to enable boarding. Thirdly, I have to consider the evidence on record and determine whether, the defendant having been aware of the defect, took reasonable steps to guard against the reasonable possibility of the plaintiff missing his flight.

### **CONSIDERATION OF THE LAW**

[11] In *Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape*<sup>1</sup> the court stated that:

*'The general rule is that she who asserts must prove. Thus in a case such as this a plaintiff must prove that the damage that she has sustained has been caused by the defendant's negligence.'*

In the present case, the plaintiff alleges that the reason he missed his flight was as a result of the negligence of the defendant. He therefore carries the burden to prove his assertion.

[12] In *Cecilia Goliath's*<sup>2</sup> case the court referred, with approval, to the case of *Osborne Panama SA v Shell and BP South African Petroleum Refineries*<sup>3</sup> (Pty) Ltd and stated that:

*'Thus in every case, including one where the maxim res ipsa loquitur is applicable, the enquiry at the end of the case is whether the plaintiff has discharged the onus resting upon her in connection with the issue of negligence.'*

[13] The test of establishing negligence is long settled in our law. The leading case in this instance is *Kruger v Coetsee*,<sup>4</sup> wherein the court held that:

*"For the purpose of liability culpa arises if-*

*13.1 a diligens partar familias in the position of the defendant;*

*13.1.1. would foresee the reasonable possibility of his conduct injuring another in his persons or property and causing him patrimonial loss and;*

*13.1.2. would take reasonable steps to guard against such occurrence and;*

*13.2 the defendant fails to take such steps".*

[14] The evidence has established that the problem was not with the plaintiff's passport but with the database system kept by the DHA. This system indicated the expiry date of plaintiff's passport as being a day before the date of issue of the passport. I have no doubt that such problem will result in serious inconveniences to the passport

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<sup>1</sup> *Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape*, ZASCA 2014 182 at para 8

<sup>2</sup> *Cecilia Goliath*, supra at Para 12

<sup>3</sup> *Osborne Panama SA v Shell and BP South African Petroleum Refineries (Pty) Ltd* 1982 (4) SA at 897H - 898A

holder for instance he maybe forced to spend considerably long time at the check in counter either waiting for a boarding pass to be issued or explaining over and over again to the authorities questioning him about his passport. There is also a reasonable possibility that he may be disallowed to travel. The reasonable possibility of harm and patrimonial loss under these circumstances should therefore be foreseen by a reasonable person in the position of the defendant.

[15] Mr Smith testified and confirmed that indeed there were discrepancies between the information kept in the DHA's system and the information on the hard copies of the passports of a number of individuals. The discrepancies were by nature an information technology problem. The DHA was aware of this problem and consequently put measures in place to resolve the problem. This is yet another indication that the defendant did foresee the reasonable possibility of its conduct causing harm and consequently patrimonial loss to the plaintiff and others in similar circumstances. The question therefore is whether the measures put in place by the defendant were reasonable to guard against such harm and loss.

[16] The evidence further indicates that the defendant established an operation centre in order to assist the airlines with challenges relating to passports. This centre is accessible 24 hours around the clock. There are several telephone lines which include the DHA's officials' own private cell phone numbers set aside for this purpose. The DHA's system is able to generate an override code within a minute from the time of request. Mr Gelderblom testified that the DHA's system is linked to the airline APP's system but the systems are not interlinked. He is able to see the APP's system of the airline from his own screen and in that way he is able to detect a problem, anticipate a telephone call from the airline and prepare himself to assist long before the airline contacts him for assistance. He further testified that should there be a passport related problem the airline staff at the check in counter would be prompted by the APP's system to contact the DHA for an override code. That airline official would necessarily be required to immediately contact the DHA and request the override code. All of the above constitute the measures put in place by the defendant. It is clear that the defendant through its officials was available around the clock to offer assistance and resolve

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<sup>4</sup> Kruger v Coetsee 1966 (2) AD 428 at 430 E

problems relating to passports and in particular of the nature experienced by the plaintiff. It is my view that a diligence *partar familias* in the position of the defendant would have acted in the manner in which the defendant did.

The evidence of the plaintiff and Mr Monyamani did not go to the extent of challenging the reasonableness of the measures taken by the defendant. Their evidence also did not at least suggest the nature of reasonable steps which ought to have been taken by the defendant.

[17] It was submitted by the plaintiff that the error in the database system of the DHA which relates to the plaintiff's passport delayed the issuing of the boarding pass and consequently the defendant should be held liable. However the evidence of the plaintiff under cross examination is that he does not know whether it is the airline or the DHA which caused the delay. When the plaintiff was at counter 836 and after handing over his passport to Keletso, the first transaction using plaintiff's passport was logged into the APP airline system at 18h45 and the system immediately reflected "contact DHA". There is no evidence on record that Keletso did contact the DHA because she was not called as a witness. On the other hand Mr Gelderblom testified that he arrived at work at 18h00 and since then till around 19h50 he never received a telephone call from the airline. I found him to be a credible witness more so that he was consistent in his evidence. He did not exaggerate his evidence he made concessions where it was appropriate to do so, for instance he conceded that the DHA's system needed to be improved so as to be interlinked with the APP's system. I also found his evidence to be more probable as it is corroborated by other evidence, namely; exhibits referred to on page 60 - 69 of Bundle F.

[18] The second transaction was logged in at 19h06:15 and the airline APP system immediately responded by indicating "invalid passport number format". That indicated that the airline official had punched in an incorrect passport number. This fact is not placed in dispute. Since then the airline official made several transactions all of which were unsuccessful. Mr Gelderblom received a request for an override code at approximately 19h50 and in less than a minute furnished the official with the code. The code was never used and when used the incorrect option was utilised instead of the government override option. Since the time of the first transaction at 18h45 there was a

delay in requesting the override code in order to suggest that the DHA delayed with the override code. I find that the delay was not caused by the defendant.

[19] The plaintiff bears the onus to prove his case on a balance of probabilities. He must prove that the defendant acted negligently and that such negligence caused him patrimonial loss. The plaintiff has failed to discharge this onus. I accordingly find that his action should fail.

[20] It is therefore ordered:

1. The plaintiff's action is dismissed with costs inclusive of defendants' counsel costs.

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**NKOSI AJ**

**16 September 2016**