

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NUMBER: A407/2014

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED:
11/06/15 DATE	
 SIGNATURE	

In the matter between

SB KEYSER

and

SOUTH AFRICAN CIVIL AVIATION AUTHORITY

THE CIVIL AVIATION APPEAL COMMITTEE

12/6/2015

APPELLANT

1ST RESPONDENT

2ND RESPONDENT

DE VRIES AJ

JUDGMENT

1. This is an appeal brought against the decision of the 2nd Respondent by virtue of the provisions of Section 127 of the Civil Aviation Act 13 of 2009.
2. The order appealed against reads:

"The decision of the Respondent is confirmed and the appeal is dismissed. The penalty notice is confirmed and the appeal fee is forfeited."

3. This order was handed down by the 2nd Respondent on the 9th of May 2014. The following grounds of appeal were relied upon in the notice of appeal:

- "1.1 In finding that the Appellant was the CEO of Fantini Air when the Appellant conducted Language Proficiency Tests on the 29th of January 2011 when the Manual of Procedure was already changed and approved on the 5th of January 2011 where the Appellant was not registered as the CEO of Fantini Air; and*
- 1.2 In finding that Esmeralde Melnick did not orally authorise Fantini Air to continue with its operations after the approval of the amended manual of procedure on the 5th of January 2011; and*
- 1.3 In not finding that as at the 29th of January 2011 Fantini Air had a valid (sic) valid Aviation Training Organisation Approval; and*
- 1.4 In not finding that the operations of Fantini Air was (sic) only suspended by Esmeralda Melnick via email on 28 February 2011; and*
- 1.5 In not finding that Esmeralda Melnick who was a SACAA employee and flight operations inspector at the time who approved the MOP on 5 January 2011 gave verbal approval for Fantini Air FTS to continue training until she could arrange a date on which she was to conduct an inspection as she was not able to conduct the inspection immediately; and*

1.6 *In not finding that the obligation to maintain aviation training records rests upon the Aviation Training Organisation, Fantini Air and not on the Appellant.*

4. Before dealing with the Appeal, the following appears to have taken place:

4.1 On the 12th of February 2013 a document headed "Penalty Notice following Notice of Intended Enforcement Action" was to be served on the Appellant in terms of Regulation 185.00.3(12) of the Civil Aviation Regulation 2011 (CAR) that on the 20th of January 2011 near Delmas Mr SB Keyser, (0270133275), the Appellant, unlawfully and wrongfully committed an offence in terms of Regulation 185.00.1(1)(F) of the CAR which reads as follows:

*"Any person who –
does or causes, or permits to be done or caused, any act contrary to, or fails to comply with, any provision of these regulations, or a direction given or a prohibition made or a condition imposed in terms thereof;
shall be guilty of an offence."*

4.2 The aforesaid document further reads:

"It was found that you, under the auspices of Fantini Air FTS conducted language proficiency tests on three pilots (Mr Robertson, Mr Joubert and Mr Hartwanger) without Fantini Air FTS having a valid Aviation Organisation Approval.

It was further found that on your instruction, Mr Aucamp were (sic) requested to destroy the records/recordings for these pilots, as the tests were invalid.

We have in our possession the following:

- E-mail correspondence from Mr Aucamp.
- Language proficiency test.

This will be used in the investigation"

4.3 The various regulations and technical standards contravened are further set out in the notice.

4.4 The Appellant was called upon to pay a sum of R 10 000.00 and was admonished to take notice that:

"(1) You have a right to appeal this Penalty Notice to the DCA.

(2) Should you not pay the amount stated on the Penalty Notice within the period of 30 (thirty) days and should you fail to deliver an appeal with evidence to the DCA within the period of 14 (fourteen) days –

(a) you will be held to have admitted to the offence;

(b) the DCA may approach the courts; and

(c) you may thereafter be summonsed to appear before the courts in terms of the Criminal Procedure Act.

(3) Should you pay in terms of the Penalty Notice, A Notice of No Further Action will be issued to you.

(4) Should you have lodged an appeal in compliance with the conditions specified herein in respect of the Penalty Notice –

(a) You will, within 14 days of receipt of such appeal receive confirmation thereof; and

(b) the DCA shall adjudicate on the matter and make a Final Decision either by a confirmation, an amendment, or the withdrawal of the Penalty Notice."

- 4.5 After issue of the notice, representations were made by attorneys acting on behalf of the Appellant and it was submitted that on the 29th of January 2011 Fantini Air FTS was in possession of a valid Aviation Training Organisation Approval.
- 4.6 This submission was made on the basis that approval for the renewal of the ATO was submitted in terms of Regulation Part 141.02.13 accompanied by the prescribed fee and a training and procedure manual together with proof of accreditation in terms of Regulation 141.02.6.
- 4.7 It is further alleged that the Civil Aviation Regulations contain no provision that approval of the ATO is automatically suspended or cancelled if the Civil Aviation Authority does not timeously perform inspections. This fact, it is further said, does not affect the validity of the approval of the ATO or the renewal.
- 4.8 It further goes on to say that the relevant aviation training organisation approval was only suspended by the CAA on the 28th of February 2011 in terms of an e-mail notice received from Esmeralda Melnick pending an inspection to be performed by the CAA.
- 4.9 As regards the second charge, it was said that the Appellant had requested Aucamp to destroy the records as he had been incorrectly informed by Mr. Neil Thomas, the CAA Manager of Part 141 that the tests were invalid as Fantini was not in possession of a valid aviation training organisation approval at the relevant time.

- 4.10 It is further said that the Appellant did not intend to defeat the purposes of Part 141.02.14 as the Appellant had been acting on the instructions and advice of the CAA.
- 4.11 The representations made by the Appellant were replied to by way of a memo sent by Ms Hannelie Oosthuizen, presumably the same person who had issued the penalty notice.
- 4.12 Following upon his further representations, a final decision was taken by the Acting Director of Civil Aviation in terms of which the Penalty Notice was confirmed.
- 4.13 This in turn led to the Civil Aviation Authority and his application for re-designation as a flight examiner was declined. The reasons for the confirmation of the penalty notice were supplied by the Acting Director of Civil Aviation on the 19th of July 2013.
- 4.14 This was in turn followed by a Notice of Appeal to the Appeal Board.
- 4.15 A point was raised *in limine* regarding the fact that the person who furnished the reasons was not the same person who had confirmed the sanction.
- 4.16 Apart from this new point the notice of appeal contained the same points as raised in the Appellant's submissions made previously.
- 4.17 This in turn elicited a response by the SACAA during September of 2013 and was signed by the Acting Director of Civil Aviation, Poppy Khoza.

- 4.18 The Appeal took place on the 4th of April 2014 and the decision of the appeal court was handed down on the 9th of April 2014.
- 5 The procedure adopted by the board was that the Appellant only gave evidence under oath.
- 6 The 1st Respondent indicated that no evidence would be led before the appeals board.
- 7 The salient features of the evidence given by the Appellant was as follows:
- 7.1 That a new manual of procedure had been approved on the 5th of January, 24 days before the alleged offence;
- 7.2 The fees for renewal had been paid during August of 2010, and
- 7.3 That he had received verbal approval from Mrs Esmeralda Melnick to proceed with the operations.
- 8 He further adduced evidence that at the time when the language tests were conducted he was not involved as the owner of the ATO or anything to that effect.
- 9 The legal representative of the Appellant objected to questions put to the Appellant that his version was not true on the basis that they had indicated that they would not call any witnesses and that by virtue thereof they were not entitled to cross-

examine the Appellant regarding the authority which he had alleged he had received from Esmeralda Melnick.

- 10 With regard to the destruction of records of the language testing, he said that he had to protect the school. He had mentioned to the owner that the feeling of the SAA was that the school was not accredited, that he disagreed with this but rather than to involve the school in problems, to ask the people to cancel or throw away the forms and to go to another flight school for their tests so that a problem would not be created in this regard.
- 11 He denied that this was done with any intention to interfere with the investigation and his explanation in this regard is borne out by the fact that there was never any attempt to deny that the tests complained of had been conducted.
- 12 The appeal boards rejected the submission that the incorrect procedure had been followed in as much the reasons supplied for the decision was supplied by a different person than the person who had made the decision.
- 13 The committee based its finding on the fact that *"the officials involved were acting in terms of the Act"*.
- 14 The appeal committee then went on to make a finding that the proper procedures had not been followed for renewal of the ATO Approval but did not deal with the substance of the Appellant's defence being that verbal authority had been given.
- 15 The only evidence regarding Esmeralda Melnick's involvement was an e-mail dated the 21st of February 2011 and directed by her to Mr Neil Thomas. The body of the e-mail provides as follows:

"I approved the ATO Manual for Fantini Air. I wanted to go to do the inspection to activate the school again since it was dormant but unfortunately the SNT budget came into play and I advised Fanie that I would be unable to do the audit. I have no record of telling the school to continue training in the meantime until we would go do the audit."

- 16 Against the background of the submissions made by the South African Civil Aviation Authority that the approval had lapsed one would have expected Melnick, if she were of a similar view at the time, to have said that no approval could be given since it had lapsed, and that she would and could not have given verbal approval against that background.
- 17 The content of that e-mail does not provide an answer to the assertion under oath that she had given such authority.
- 18 The CAA, well aware of the defence failed to call a witness at the appeal hearing to enable the committee to evaluate the Appellant's evidence.
- 19 His evidence was further to the effect that he received an e-mail on the 15th of February that the school should cease operations.
- 20 Against this background whether the test applicable is one of balance of probabilities or beyond reasonable doubt the appeals board could not and should not have confirmed the decision of the Director of Civil Aviation and the decision falls to be set aside.
- 21 As regards costs, although the Act prescribes for the matter to be heard as a Civil Appeal it does not derogate from the fact that the proceedings are of a criminal nature, we enquired from counsel whether there was any guidance to be found in regard

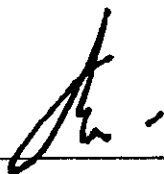
to costs appertaining to the appeal procedures in the relevant regulations and they were unable to do so.

22 The 1st Respondent's acts in the public interest and although mistaken in their approach to this particular matter, there can be no finding in regard to *mala fides* or an ulterior motive and we would decline to make any order for costs in this matter.

23 I would propose that the following is made:

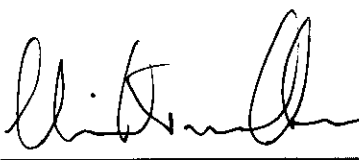
23.1 The appeal succeeds;

23.2 The Penalty Notice is set aside.



DE VRIES AJ

I concur, the order as proposed is made.



TUCHTEN NB