

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2023-119918

DATE: 5 November 2024

In the matter between:

AVIATION CO-ORDINATION SERVICES (PTY) LIMITED
AIRLINES ASSOCIATION OF SOUTHERN AFRICA NPC
BOARD OF AIRLINE REPRESENTATIVES OF SA NPC

First Applicant
Second Applicant
Third Applicant

and

AIRPORTS COMPANY SOUTH AFRICA SOC LIMITED
THE MINISTER OF TRANSPORT
THE MINISTER OF FINANCE
SOUTH AFRICAN CIVIL AVIATION AUTHORITY
AIR BOTSWANA (PTY) LIMITED
AIR PEACE
AIR ZIMBABWE (PRIVATE) LIMITED
BRITISH AIRWAYS PLC
CONGO AIRWAYS SA
COMAIR LIMITED t/a BRITISH AIRWAYS AND KULULA
ETIHAD AIRWAYS
FLYSAFAIR

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent
Eleventh Respondent
Twelfth Respondent

GLOBAL AVIATION OPERATIONS (PTY) LIMITED t/a GLOBAL AIRWAYS and LIFT	Thirteenth Respondent
LUFTHANSA AIRPLUS SERVICEKARTEN GMBH t/a LUFTHANSA	Fourteenth Respondent
PRECISION AIR SERVICES LIMITED t/a PROFLIGHT ZAMBIA	Fifteenth Respondent
SWISS INTERNATIONAL AIR LINES AG t/a SWISS	Sixteenth Respondent
TAAG ANGOLA AIRLINES E.P t/a TAAG	Seventeenth Respondent
AIR CHINA LIMITED	Eighteenth Respondent
AIR MAURITIUS LIMITED	Nineteenth Respondent
MALAWIAN AIRLINES (PTY) LIMITED	Twentieth Respondent
WESTAIR AVIATION LIMITED	Twenty First Respondent
AIR ALGERIE (PTY) LIMITED	Twenty Second Respondent
ROYAL ESWATINI NATIONAL AIRWAYS	Twenty Third Respondent
UGANDA AIRLINES	Twenty Fourth Respondent
ZAMBIA AIRWAYS LIMITED	Twenty Fifth Respondent

Neutral Citation: *Aviation Co-Ordination Services and Others v Airports
Company South Africa and Others (2023-119918) [2024]*
ZAGPJHC --- (5 November 2024)

Coram: Adams J

Heard: 28 and 29 October 2024

Delivered: 5 November 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 5 November 2024.

Summary: Civil procedure – urgent application – applicant should set forth explicitly reasons why matter is urgent – self-created urgency does not necessarily mean that the application should be dismissed – in appropriate instances there should be an intervention by the Court – when there is a manifest illegality – such as where an organ of state is purporting to exercise a

power which it does not have – application held to be urgent – Uniform Rules of Court, rule 6(12) –

Review – application to declare unlawful, and to have reviewed and set aside, the decision by first respondent (ACSA) to ‘insource’ the provision of hold baggage screening (HBS) and other services currently provided by the first applicant (ACS) at all of ACSA’s airports –

Pending the hearing of the review application, applicants seek to interdict and restrain ACSA from proceeding with tender processes and from implementing its decision to ‘insource’ – applicants also seek *mandamus* to compel specific performance – therefore, application for suspension of public procurement and tender processes, as well as for *mandamus* – whether requirements for interim interdict complied with – an applicant must show: (a) A *prima facie* right in terms of substantive law; (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) The balance of convenience favours the granting of an interim interdict; and (d) The applicant has no other satisfactory remedy – the Civil Aviation Regulations, 2011 (‘CARS’) and the Civil Aviation Technical Standards (‘CATS’) – the first applicant’s statutory right –

Interdict and *mandamus* granted with costs.

ORDER

- (1) The applicants' application is declared to be urgent. The forms and service provided for in the Uniform Rules of Court are dispensed with, and it is directed that the matter be heard as an urgent application in accordance with Rule 6(12) of the Uniform Rules of Court.
- (2) The fourth respondent's interlocutory application dated 10 July 2024 to strike out the applicants' replying affidavit or certain paragraphs thereof, be and is hereby dismissed with costs.
- (3) The fourth respondent shall pay the applicants' costs of the said interlocutory application, including the costs of two Counsel, one being Senior Counsel (where so employed) on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court
- (4) Pending the determination of the review application instituted by the applicants under case number 2023/119918 on 16 November 2023 ('the 2023 review application'), the first respondent, Airports Company of South Africa ('ACSA'), be and is hereby interdicted from taking any steps or any further steps, to:
 - (a) adjudicate a tender and award a contract/s, for the purchase of hold baggage screening ('HBS'), baggage reconciliation system ('BRS') or baggage management system ('BMS') equipment and/or services; and
 - (b) otherwise implement its decision taken on 18 May 2023 and confirmed on 8 September 2023 to insource the provision of HBS, BRS and BMS at ACSA's airports.
- (5) ACSA be and is hereby directed to allow the first applicant, Aviation Co-ordination Services (Pty) Limited ('ACS'), to replace four Level 3 back-up HBS units with new back-up units ('the back-up units') at OR Tambo International Airport and King Shaka International Airport.

- (6) The fourth respondent, the South African Civil Aviation Authority ('the SACAA'), be and is hereby directed to approve the replacement of the back-up units within five days of this order for the replacement of those units within ten days of this order.
- (7) The first, second and fourth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of this opposed urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicants for interim interdictory and mandatory relief against the first to fourth respondents. Pending the determination of final relief sought in a judicial review application instituted by the applicants under the above case number on 16 November 2023 ('the 2023 review application'), the applicants seek to interdict and restrain the first respondent, Airports Company South Africa SOC Limited ('ACSA'), from proceeding with tender processes for the purchase of hold baggage screening ('HBS'), baggage reconciliation system ('BRS') or baggage management system ('BMS') equipment and/or services and from implementing its decision to 'insource' the provision of HBS, BRS and BMS at ACSA's airports.

[2]. The applicants also apply for orders directing: (a) ACSA to allow the first applicant, Aviation Co-ordination Services (Pty) Limited ('ACS'), to replace four Level 3 back-up HBS units with new back-up units ('the back-up units') at OR Tambo International Airport and King Shaka International Airport; and (b) the fourth respondent, the South African Civil Aviation Authority ('SACAA'), to approve the replacement of the back-up units.

[3]. In the 2023 review application, the applicants apply for an order declaring unlawful the decision taken by ACSA on or about 18 May 2023, and confirmed on or about 8 September 2023, to insource the provision of HBS services currently provided by ACS at all of ACSA's airports. The applicants also apply to have the said decision reviewed and set aside. The applicants apply for similar relief in relation to decisions taken by ACSA to insource the provision of BRS and BMS currently provided by ACS at all of ACSA's airports.

[4]. In the alternative, the applicants in the 2023 review application apply for orders compelling ACSA to comply with its contractual obligations in terms of which ACS provides the HBS, BRS and BMS services.

[5]. Lastly, the applicants apply for an order declaring unlawful ACSA's decision to terminate the provision by ACS of the HBS, BRS and BMS and 'all other interrelated systems' to all ACSA's airports, as well as for an order reviewing and setting aside the said decision.

[6]. In sum, in this urgent application, the applicants apply to have maintained the *status quo ante* in the interim period prior to the adjudication of the 2023 review decision. The first, second and fourth respondents ('respondents') oppose the urgent application *inter alia* on the grounds that the application is not urgent. In the event that it is determined that there is any urgency, then it is submitted, on behalf of the respondents, that the urgency is entirely self-created. The respondents furthermore contend that, even if it is found that the applicants are entitled to the relief claimed on an urgent basis, the application should nevertheless fail because the applicants have not satisfied the requirements for interim interdictory and mandatory relief.

[7]. The third respondent (the Minister of Finance) and the fifth to twenty fifth respondents (all Airlines which operate at, from and to airports in South Africa owned by ACSA) did not participate in these urgent application proceedings. The assumption is that all of the aforementioned respondents will abide the decision of this Court.

[8]. The issues to be decided in this urgent application is whether the application is urgent and whether the applicants have made out a case for the interim relief they seek. Those issues are to be decided against the factual backdrop of the matter, the facts being in the main common cause and as set out in the paragraphs which follow,

[9]. During December 2021 to April 2022, ACSA consulted with stakeholders on the future of HBS at its airports, including on whether to terminate the provision of HBS services by ACS and to insource these services. During May 2023 ACSA took the decision to terminate the provision of HBS services by ACS at its airports and to insource the provision of these services. The decision was subject to approval by the third respondent ('the Minister') and that approval was only given (subject to a condition) on 8 March 2024. On 17 and 20 May 2024 ACS received notice of termination from ACSA, who also gave notice that it would issue a tender for the provision of these services for the sum of R3.15 billion. The required PFMA approval by the Minister states that ACSA's request for approval to acquire HBS equipment as aforesaid is approved 'on condition that all legal and operational challenges with regard to [HBS] being fully resolved by ACSA'.

[10]. ACSA's main gripe with the *status quo* is that it does not, in ACSA's view, comply with section 217 of the Constitution.

[11]. The interdict and the *mandamus* sought by the applicants against ACSA, according to the applicants, is aimed at preventing unlawful conduct on ACSA's part. ACSA, so the applicants contend, cannot legally take the steps it has purported to take before the 2023 review applications are finally determined. For this reason alone, so it is submitted on behalf of ACS, the interdict sought against ACSA should be granted.

[12]. As regards urgency, it is trite that the test for urgency is whether an applicant can or cannot be afforded substantial redress at a hearing in due

course. As was held by this court in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others*¹: -

‘In terms of Rules 27 and 6(12), the applicant has to show good cause why the time should be abridged and why it could not be afforded substantial redress at a hearing in due course.’

[13]. The test is whether an applicant can be afforded sufficient redress at a hearing in due course, and self-created urgency does not mean that, as a matter of course, the application should be dismissed. Moreover, in *Apleni*² this Court held that in appropriate instances there should be an intervention by the Court when there is a manifest illegality, such as an instance where an organ of state is purporting to exercise a power which it does not have:

‘[8] [The applicant] also alleges that the application was brought to vindicate the Rule of Law, to ensure that the power is exercised by the correct repository of the power. As such, the application is founded on s 1 (c) of the Constitution, and it was his contention that the decision of the Minister infringed upon the principle of legality, and that as a result, the application was inherently urgent.

... ..

[10] Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the Rule of Law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally to be urgently considered.’

[14]. On the basis of the principles enunciated in these authorities, I find that there cannot be any dispute relating to the urgency of the relief sought. As contended by the applicants, the interim interdict in respect of the implementation of the insourcing decision is sought to avoid what may ultimately prove to be irregular and wasteful public expenditure by ACSA in the period prior to the determination of the main application, to avoid disruption and to ensure that ACS is not denied effective relief arising from the implementation of the insourcing decision. The applicants sought this relief when it became apparent, on 20 May 2024, that ACSA was intent on embarking upon a tender process for new HBS equipment – and thus on implementing its decision to insource the provision of HBS – without delay, notwithstanding that the

¹ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W).

² *Apleni v President of the Republic of South Africa* [2018] 1 All SA 728 (GP) at paras 7-10.

lawfulness of that decision, which forms the subject of the pending 2023 review application.

[15]. The interim *mandamus* for the replacement of the back-up units is sought to enable ACS to provide HBS services in an efficient manner in the period prior to the determination of the 2023 review application. It is necessitated by the fact that the original equipment manufacturer, OEM, indicated that it would no longer service certain CTX machines from the end of May 2024 (although it subsequently agreed to extend the service contract for these machines for a further period) and the fact that ACSA and the SACAA, on 20 and 28 May 2024, respectively, then refused to allow the replacement of the four back-up units that would ensure the efficient provision of HBS notwithstanding the OEM's service contract coming to an end.

[16]. Moreover, there is no merit in ACSA's contention that the fact that its insourcing decision was made and has been known to the applicants since May or September 2023. Nor does the suggestion that ACS ought to have brought this application after it became aware of that decision, hold water. As submitted on behalf of the applicants, this argument misses the point. After the 2023 insourcing decision, the applicants launched the 2023 review application seeking to review and set aside that decision on 16 November 2023 following confirmation of the 2023 insourcing decision in September 2023. The simple point is that there was nothing to suggest that ACSA, faced with the 2023 review application, would implement the decision imminently. What is more is that the decision was subject to approval by the third respondent, the Minister of Finance ('the Minister of Finance'), in terms of section 54(2) of the Public Finance Management Act (PFMA)³. So, at that point, there was nothing to justify urgent relief.

[17]. It was only on 20 May 2024 that the applicants were informed that ACSA intended to issue a tender within ten days. Only then could the applicants start

³ Public Finance Management Act 1 of 1999.

preparing the urgent application, which was launched on 5 June 2024 – twelve court days from receipt of the termination notice.

[18]. The same argument applies to the interim *mandamus*. The transition between ACS and the replacement service provider will not happen at the press of a button. During the interim period while awaiting the arrival and installation of the new equipment if the back-up units fail, ACS, as submitted by it, will be forced to resort to the far slower and less reliable screening.

[19]. For all of these reasons, I am persuaded that the applicants' application is indeed urgent.

[20]. That brings me to the next issue, namely whether a case is made out by the applicants for the interim relief sought by them.

[21]. It is trite that an applicant for an interim interdict must show: (a) A *prima facie* right by proof of facts that establish the existence of a right in terms of substantive law; (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) The balance of convenience favours the granting of an interim interdict; and (d) The applicant has no other satisfactory remedy.

[22]. The correct approach to follow in determining whether a *prima facie* right is established was set out in *Webster v Mitchell*⁴ as follows:

'[T]he right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "prima facie established though open to some doubt" that is enough.

... The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant, he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some

⁴ *Webster v Mitchell* 1948 (1) SA 1186 (W).

doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.'

[23]. The Constitutional Court has also recently stated that it is sufficient for a party to assert a right adversely affected by the exercise of public power, which that applicant seeks to review. In *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg*⁵, the Constitutional Court held that 'a *prima facie* right may be established by demonstrating prospects of success in the review'.

[24]. It is the case of ACS that it has a substantive right beyond its review rights that ACSA's threatened conduct infringes – it has the right and the obligation to provide HBS services at ACSA airports, and to do so in an efficient manner. ACS currently provides HBS services at ACSA airports. It does so on behalf of airlines – which the second applicant ('AASA') and the third applicant ('BARSA') represent – which operate at ACSA airports.

[25]. ACS submits that its right is sourced from: (a) The Civil Aviation Regulations, 2011 ('CARS')⁶ and the Civil Aviation Technical Standards ('CATS') ('the statutory right'); and (b) The conditions of use – which constitute an agreement between ACSA and each airline making use of ACSA's airports and which, according to ACS, include a *stipulatio alteri* in ACS's favour ('the contractual right').

[26]. There is a dispute between the applicants and ACSA relating to the statutory right of ACS. ACSA contends that it (ACSA), and not ACS on behalf of the airlines, has the right and duty to provide HBS services at its airports. This issue is at the centre of the 2023 review application. The central legal question to be considered in the review application is whether ACSA or ACS has the

⁵ *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* 2014 (4) SA 371 (CC) para 25.

⁶ Civil Aviation Regulations, 2011 ('CARS') published by the Minister of Transport on 1 June 2012 under Government Notice No. R.425 in Government Gazette No. 35398.

statutory right and duty, as against ACSA, to provide HBS services at airports. In this application for interim relief the question to be asked is whether, at the very least, ACS has a *prima facie* case in this regard.

[27]. ACS submits that it is clearly the airlines (and ACS on their behalf) that have the statutory right and duty to provide HBS services (and BRS services) at the ACSA airports. In that regard, ACS places great emphasis on the use of the word ‘operator’ in various provisions of clause 121.07.38 of CATS, the requirements of which prescribe that the said clause applies to: (i) the operator of a large commercial air transport aeroplane engaged in international civil aviation operations; (ii) the operator of a commercial air transport aeroplane engaged in a scheduled commercial air service; and (iii) the holder of an aerodrome licence (namely ACSA). It is therefore plain, so the argument continues, that whenever reference is made to an operator it is to operators contemplated in (i) and (ii), collectively, being the airlines. This is also consistent with the fact that CATS 121.07.38.2 states that any word or expression to which a meaning has been assigned in the Civil Aviation Act bears the same meaning in CATS 121.07.38 (unless the context indicates otherwise) and ‘operator’ is defined in that Act as an airline.

[28]. ACS furthermore contends that BRS is specifically regulated by CATS 121.07.38.4(2), which makes it clear that this activity is to be conducted by the airline. This technical standard reads as follows:

‘The operator shall conduct baggage reconciliation and authorisation conforming or ensuring that the hold baggage that has been loaded belongs to passengers of the relevant flight who have actually boarded the aircraft and that the hold baggage has been subjected to the necessary security controls and is authorised for loading on that aircraft.’ (Emphasis added).

[29]. Under the heading ‘Minimum requirements for screening of hold baggage’, CATS 121.07.38.5 importantly reads as follows: -

‘(1) The operator referred to in section 1 [the airline] shall establish written procedures to ensure that hold baggage is screened taking into account the minimum requirements prescribed in this technical standard.

- (2) The under-mentioned security measures shall be applied either individually, except the method prescribed in sub-paragraph (a), or in combination, but never exclusively, to screen hold baggage checked in for carriage by air –
 - (a) searching by hand or physical search;
 - (b) screening by x-ray machine;
 - (c) screening by explosive trace detection or other similar acceptable and approved devices; or
 - (d) applying other means, both technical and bio sensory as vapour, trace detectors and dogs.
- (3) When using the method of physical search or search by hand, the following requirements shall be followed –
 - (a) the search shall be done in the presence of the passenger;
 - (b) the hold baggage shall be opened by or in front of the passenger;
 - (c) the search shall be conducted in a systematic manner, by searching between each layer of clothing and other items packed within the hold baggage;
 - (d) other loose bags within the hold baggage shall also be opened and searched; and
 - (e) upon completion of the search, the passenger shall repack the hold baggage before leaving the search area.
- (4) When using the method of screening by x-ray machine, the following requirements shall be followed –
 - (a) the operator shall ensure that all personnel handling the machine are adequately trained to operate the machine, and that such staff are able to clear alarms in terms of the protocols and layout of the system;
 - (b) the personnel operating the x-ray machine shall rotate between positions at least every twenty minutes; and
 - (c) where the x-ray machine is unserviceable or cannot be used for any other reason, measures shall be put in place for an appropriate supplementary procedure to be carried out and in line with the standard operating procedure. (5) The screening of hold baggage shall be conducted by an authorized security officer duly qualified and certified in terms of the CAR to perform such function.
- (6) Should a suspicious item be detected in the hold baggage, the passenger must be summoned to account for such baggage, and thereafter the baggage must be subjected to additional security checks. All suspicious items or baggage shall be kept aside and not loaded into the aeroplane until they are subjected to additional security measures and are cleared.
- (7) Hold baggage that has been subjected to the screening process –
 - (a) must be kept under the supervision and control of security or authorized agent;
 - (b) must be protected from unauthorized access until it is claimed by the passenger at final destination;

- (c) must be kept under constant surveillance from time of acceptance until loaded in the aeroplane and if transported by vehicle, it shall be enclosed and capable of being locked. It may be necessary in increased threat situations to provide a security escort from the baggage make-up area to the aeroplane; and
 - (d) must not be mixed with unscreened baggage.
- (8) No hold baggage shall be exempted from screening.
- (9) The levels of screening applied at any period shall be determined by the level of threat and detection of any device intended to commit an act of unlawful interference.’
(Emphasis added).

[30]. I have cited the aforesaid provision in full as it aptly demonstrates that, as contended by the applicants, the text of this applicable regulation clearly spells out that it is ACS (on behalf of the operators / Airlines) which has the duty and the right to provide HBS service.

[31]. Moreover, CATS 121.07.38.6(1) refers to ‘[a]ny equipment operated by an operator to screen hold baggage’, while CATS 121.07.38.6(3) states that the Chief, Civil Aviation Security, shall approve the HBS equipment after ‘the operator’ has met all required processes, including procurement. The reference to ‘operator’ in the phrase ‘operated by an operator’ clearly refers to an airline.

[32]. I agree with these submissions by the applicants. The foregoing issue is not one to be finally determined in these proceedings. However, it demonstrates that, at best for ACSA and the SACAA, ACS’s statutory right is *prima facie* established even if open to some doubt.

[33]. As regards ACS’s contractual right, there does not appear to be any real dispute in that regard, although ACSA states that it will amend the conditions of use after ACS ceases to provide HBS services pursuant to the termination notice. It thus accepts the need to amend the conditions of use, but it has not done so.

[34]. The applicants also contend that ACSA’s protestations about the potential breach of section 217 of the Constitution have no merit. Once it is

accepted that it is the airlines (and therefore ACS) that are responsible for HBS, section 217 of the Constitution and the PFMA do not apply. Whether the applicants are correct in their contention is not an issue which I am required to decide on. I am however of the view that, in raising the issue, the applicants have demonstrated their *prima facie* right, for purposes of this application for interim relief. The point is that, in my view, it can safely be said that *prima facie* it is the airlines that are responsible for HBS services – not ACSA. The airlines have delegated this responsibility to ACS.

[35]. For the same reasons set out above in relation to the CATS provisions, it can be said that *prima facie* the SACAA is wrong that it is ACSA that should provide HBS services and should apply for approval for the replacement of HBS equipment. The CATS standards that are relevant to the SACAA's role are silent on who should apply to the SACAA for the approval of the equipment before it can be procured. That is because the SACAA is responsible for regulating the technical standards of the equipment. It should not matter whether it is ACSA, a service provider appointed by ACSA pursuant to a procurement process as ACSA is determined to do, or ACS appointed by airlines who applies – all that the SACAA has to satisfy itself with is that the equipment proposed to be procured complies with the relevant technical standards.

[36]. I therefore conclude that the applicants have established a *prima facie* right for the purposes of the interim interdict and the interim *mandamus* they seek. As submitted by the applicants, at best for ACSA and the SACAA, ACSA's disputing ACS's statutory right to provide HBS services merely places some doubt over this right. That does not undermine the *prima facie* right that the applicants have to establish.

[37]. I now turn my attention to the requirement of irreparable harm.

[38]. In *Tshwane City v AfriForum and Another*⁷ the Constitutional Court described harm that ought to be established as follows:

‘Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing. It must not have taken place already. ...

... ..

Within the context of a restraining order, harm connotes a commonsensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily, the harm sought to be prevented through interim relief must be connected to the grounds in the main application.’

[39]. In *Doctors for Life International v Speaker of the National Assembly*⁸, the Constitutional Court held as follows: -

‘Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.’

[40]. In this matter, the interim interdict is, in my view, necessary to stop ACSA from conducting a tender process, which may turn out to be unlawful. The point is that it may well be that ACSA will be incurring expenditure (unlawfully so) in excess of R3 billion. Moreover, the installation of equipment at the ACSA airports has the real possibility of resulting in crippling disruptions. If ACSA is allowed to continue with its conduct and the applicants ultimately succeed in the 2023 review application, the Court may be forced to condone the illegality rather than trying to unscramble the egg because setting aside is a discretionary remedy.

⁷ *Tshwane City v AfriForum and Another* 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at paras 55 and 56.

⁸ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at 446 C–E.

[41]. The applicants also submit that if ACS is not allowed to replace the four back-up units, there is a real risk that the aged and out of maintenance in-line CTX machines will stop functioning, which will, in the absence of suitable back-up units, have devastating consequences for HBS services at OR Tambo International Airport and King Shaka International Airport. There is self-evidently merit in this contention.

[42]. Accordingly, I am of the view that the requirement of a reasonable apprehension of irreparable harm is established.

[43]. As for the balance of convenience, in *Olympic Passenger Service (Pty) Ltd v Ramlagan*⁹, the Court held that:

'In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy the court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him.'

[44]. In *Moyane v Ramaphosa and Others*¹⁰, it was held that when considering the balance of convenience it is appropriate to take the national interest into account where that is applicable. As submitted by the applicants, *in casu* it has to be accepted that civil aviation safety and efficient airport operations are in the national interest. It is undesirable that the procurement of the back-up units is hampered by the ongoing litigation. In that regard, I accept the averment by the applicants that the back-up units are a minor replacement (with a cost of less than 1% of the equipment replacement upon which ACSA has embarked). Moreover, ACS has made it clear that it will be procuring the back-up units at its own risk and it will sell these units to ACSA or simply remove them if the 2023 review application is unsuccessful.

⁹ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E–F.

¹⁰ *Moyane v Ramaphosa and Others* [2019] 1 All SA 718 (GP) at para 29.

[45]. The simple fact of the matter is that, if the *status quo ante* is maintained, ACSA will suffer no harm if its procurement process is halted pending the 2023 review application. On the other hand, if ACSA is allowed to go ahead, it will incur expenditure, which may turn out to be unlawful and wasteful.

[46]. As for the *mandamus*, I accept the common cause fact that there is a need to replace the back-up units and the harm that will ensue without their replacement if the accompanying in-line CTX machines were to fail – as they almost certainly will when ACS no longer has the OEM supporting them. The flipside of the coin that ACSA and the SACAA will suffer no harm if the relief sought is granted. ACS has accepted the risk of procurement of the back-up units.

[47]. I accordingly have no doubt in my mind that the balance of convenience favours the granting of both the interim interdict and the interim mandamus.

[48]. Lastly, I turn my attention to the requirement that there must be no other satisfactory remedy available to the applicants, in respect of which the court in *Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annalene Restaurants CC t/a O'Hagans*¹¹, held that, to be satisfactory, an alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.

[49]. In *Hotz and others v University of Cape Town*¹², the Supreme Court of Appeal stated the following in relation to this requirement:

‘... ... [T]he purpose of an interdict is to put an end to conduct in breach of the applicant's rights. The applicant invokes the aid of the court to order the respondent to desist from such conduct and, if the respondent does not comply, to enforce its order by way of the sanctions for contempt of court. Secondly, the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended. That is why, in

¹¹ *Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annalene Restaurants CC t/a O'Hagans* [2001] 4 All SA 415 (C) para 17.

¹² *Hotz and others v University of Cape Town* [2016] 4 All SA 723 (SCA) para 36.

many cases a court will weigh up whether an award of damages will be adequate to compensate the injured party for any harm they may suffer. There may also be instances where, in the case of a statutory breach, a criminal prosecution, in appropriate circumstances, will provide an adequate remedy, but there are likely to be few instances where that will be the case. Thirdly, the alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court. The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict."

[50]. On the basis of these authorities, I conclude that the applicants do not have an alternative satisfactory remedy. I am of the view that it can safely be said that, if the equipment that would no longer be supported by the OEM fail, the provision of HBS services would be hamstrung. That is not the kind of harm that can be diminished by a damages claim. The only suitable remedy is to allow ACS to provide HBS efficiently with the tools it needs. Therefore, I reiterate that there is no alternative remedy to the interim mandamus.

[51]. Accordingly, I conclude that a proper case is made out by the applicants for the interim relief sought.

[52]. There is one last issue which I need to deal with and that relates to an interlocutory application by the fourth respondent (SACAA) to have struck out ACS's replying affidavit in its entirety or paragraph 204 thereof, as well as to have the supporting affidavits of the second applicant ('BARSA') and the third applicant ('AASA') struck out.

[53]. The said interlocutory application is based on SACAA's contention that new issues were raised by ACS in its replying affidavit and that the SACAA does not have an opportunity to deal with those issues in a further affidavit. Furthermore, SACAA contends that the applicants were not entitled to file affidavits in support of certain averments in the applicants' founding affidavit at any time other than simultaneously with the delivery of the founding affidavit. As

correctly contended by the applicants, there is no authority that supports the latter contention by SACAA.

[54]. SACAA is also wrong insofar as it contends that it cannot, as a blanket rule, file an affidavit in answer to ‘new matters’ raised by the applicants in their replying affidavit. The authority for this proposition is *Drift Supersand (Pty) Limited v Mogale City Local Municipality and Another*¹³, which held as follows: - ‘As this Court recently stated in *Lagoon Beach*, not only must a court exercise practical, common sense in regard to striking out applications but there is today a tendency to permit greater flexibility than may previously have been the case to admit further evidence in reply. Consequently, as stated in *Nkengana*, “if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding affidavit in order to set out a cause of action, the court will refuse an application to strike out”.’

[55]. On the basis of these authorities, I am of the view that the interlocutory application falls to be dismissed with costs. SACAA simply does not make out a case for the striking out of the replying affidavit or the said paragraph.

[56]. I conclude, in sum, that the applicants’ application for interim interdictory and mandatory relief should, in all the circumstances, succeed.

Costs

[57]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹⁴.

¹³ *Drift Supersand (Pty) Limited v Mogale City Local Municipality and Another* [2017] 4 All SA 624 (SCA) para 10. See also *Nkengana and another v Schnetler and Another* [2011] 1 All SA 272 (SCA) para 10; *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 143 (SCA); [2016] 1 All SA 660 (SCA) para 16.

¹⁴ *Myers v Abrahamson* 1951(3) SA 438 (C) at 455

[58]. I can think of no reason why I should deviate from this general rule. The first, second, third and fourth respondents should therefore be ordered to pay the costs of the applicants of the opposed urgent application.

Order

[59]. In the result, I make the following order:

- (1) The applicants' application is declared to be urgent. The forms and service provided for in the Uniform Rules of Court are dispensed with, and it is directed that the matter be heard as an urgent application in accordance with Rule 6(12) of the Uniform Rules of Court.
- (2) The fourth respondent's interlocutory application dated 10 July 2024 to strike out the applicants' replying affidavit or certain paragraphs thereof, be and is hereby dismissed with costs.
- (3) The fourth respondent shall pay the applicants' costs of the said interlocutory application, including the costs of two Counsel, one being Senior Counsel (where so employed) on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court
- (4) Pending the determination of the review application instituted by the applicants under case number 2023/119918 on 16 November 2023 ('the 2023 review application'), the first respondent, Airports Company of South Africa ('ACSA'), be and is hereby interdicted from taking any steps or any further steps, to:
 - (a) adjudicate a tender and award a contract/s, for the purchase of hold baggage screening ('HBS'), baggage reconciliation system ('BRS') or baggage management system ('BMS') equipment and/or services; and
 - (b) otherwise implement its decision taken on 18 May 2023 and confirmed on 8 September 2023 to insource the provision of HBS, BRS and BMS at ACSA's airports.
- (5) ACSA be and is hereby directed to allow the first applicant, Aviation Co-ordination Services (Pty) Limited ('ACS'), to replace four Level 3 back-up

HBS units with new back-up units ('the back-up units') at OR Tambo International Airport and King Shaka International Airport.

- (6) The fourth respondent, the South African Civil Aviation Authority ('the SACAA'), be and is hereby directed to approve the replacement of the back-up units within five days of this order for the replacement of those units within ten days of this order.
- (7) The first, second and fourth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of this opposed urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	28 th and 29 th October 2024
JUDGMENT DATE:	5 th November 2024 – Judgment handed down electronically
FOR THE FIRST TO THIRD APPLICANTS:	F Snyckers SC, with N Luthuli
INSTRUCTED BY:	Webber Wentzel, Sandton
FOR THE FIRST RESPONDENT:	T Motau SC, with L Kutumela and N B Kekana
INSTRUCTED BY:	Mashiane, Moodley & Monama Inc, Sandown, Sandton
FOR THE SECOND RESPONDENT:	K Kgoroadira
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE THIRD RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance
FOR THE FOURTH RESPONDENT:	P L Mokoena SC and T K Manyage SC
INSTRUCTED BY:	Mfinci Bahlman Incorporated, Lynnwood, Pretoria
FOR THE FIFTH TO THE TWENTY FIFTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance