

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: 28 February 2025

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 --- (28 February 2025)*

Coram: Adams J

Heard: 25 February 2025 – ‘virtually’ as a videoconference on *Microsoft Teams*

Delivered: 28 February 2025 – 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 11:30 on 28 February 2025.

Summary: Application for leave to appeal – s 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 – an applicant required to show that the appeal would have a reasonable prospect of success (s 17(1)(a)(i)) – or there is some other compelling reason why the appeal should be heard (s 17(1)(a)(ii)) –

applicants for leave to appeal comply with both these requirements – leave to appeal granted to both applicants –

Appealability of impugned order – depends on whether granting leave to appeal would best serve the interests of justice – other factors to be considered – whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration – it is, however, not the only or always decisive consideration – judgment held to be appealable –

Section 18(2) of the Superior Courts Act – the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment are suspended pending an appeal – declaratory order granted in terms of s 18(2).

ORDER

- (1) The first respondent is granted leave to appeal to the Full Court of this Division.
- (2) The costs of the first respondent's application for leave to appeal shall be costs in the appeal.
- (3) The fourth respondent is granted leave to appeal against paragraph (6) of the Order of this Court dated 5 November 2024.
- (4) The costs of the fourth respondent's application for leave to appeal shall be costs in the appeal.
- (5) The applicants' application for declaratory relief in terms of section 18 of the Superior Court Act 10 of 2013 succeeds with costs.
- (6) It is declared that the orders in paragraphs (5) and (6) ('the mandamus') of the order of this Court dated 5 November 2024 are operative and are not suspended by the first respondent's (ACSA's) and the second respondent's (the SACAA's) applications for leave to appeal or appeals.
- (7) ACSA and SACAA be and are hereby ordered and directed to comply with the mandamus within ten days from date of this order.
- (8) ACSA and SACAA shall pay the applicants' costs of the section 18 application, jointly and severally, the one paying the other to be absolved, which costs shall include the costs consequent on the employment of two Counsel, one being Senior Counsel, on the scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.
- (9) ACSA's conditional counter-application is dismissed with costs.
- (10) ACSA shall pay the applicants' costs of the conditional counter-application, which costs shall include the costs consequent on the employment of two Counsel, one being Senior Counsel, on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.

JUDGMENT
[APPLICATION FOR LEAVE TO APPEAL and
SECTION 18(3) APPLICATION]

Adams J:

[1]. I shall refer to the parties as referred to in the original Urgent Application by the first to third applicants ('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. On 5 November 2024, I granted in the main the applicants' Urgent Application for interim relief, with costs, and *inter alia* interdicted the first respondent, Airports Company of South Africa ('ACSA'), from taking any further steps to 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. ACSA and the fourth respondent, the South African Civil Aviation Authority ('SACAA') were also ordered 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.

[2]. ACSA applies for leave to appeal against the whole of the judgment and the aforesaid order (including the costs order), as well as the reasons therefor, which I handed down on 5 November 2024. SACAA also applies for leave to appeal against that portion of the said judgment and order in terms of which it (SACAA) was directed to approve the replacement by the first applicant, Aviation Co-ordination Services (Pty) Ltd ('ACS'), of the back-up units with new back-up units at OR Tambo International Airport and King Shaka International Airport.

[3]. Both these applications for leave to appeal are based on the provisions of both sub-sections (i) and (ii) of section 17(1)(a) of the Superior Courts Act 10 of 2013, which reads as follows: -

'17 Leave to appeal

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
- (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b)'.

[4]. The applicants, on the other hand, apply for an order declaring that the orders in paragraphs (5) and (6) ('the mandamus') of my order are operative and were not suspended by ACSA's and SACAA's applications for leave to appeal, alternatively, the applicants ask for an order that those orders are to operate pending any application for leave to appeal as well as any appeal. Paragraphs (5) and (6) of the Order read as follows: -

- (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.'

[5]. ACSA has preferred a 'conditional counter-application' against the applicants in the event of the Court granting the applicants the declaratory relief sought by them in the aforementioned application. In its conditional counter-application, ACSA applies for an order that the implementation and the operation of orders (5) and (6) be suspended pending an appeal on the basis that there exist exceptional circumstances that warrant the issuing of such an Order suspending the execution and operation of the said orders. The exceptional circumstances, so ACSA avers, arise from the fact that if the court

orders are executed, ACSA will be prevented from exercising its statutory powers, arising from the Chicago Convention, the ACSA Act and PFMA.

[6]. It is convenient to deal with all of the foregoing applications in one judgment in view of the fact that the issues implicated in all of these applications overlap to a great extent.

[7]. I proceed to deal first with the applications for leave to appeal, both of which are based on an assertion by ACSA and SACAA that the application raises issues of considerable importance which are of public interest and implicate the manner in which ACSA performs its statutory duties. The appeal accordingly raises, so ACSA and SACAA contend, important issues of public interest, thus giving rise to a compelling reason why the appeal should be heard. Additionally, these parties contend that the appeal has reasonable prospects of success, having regard *inter alia* to the fact that the *prima facie* right relied upon by ACS depends to a great extent on the interpretation of the relevant legislative and regulatory provisions. Another court, so the argument on behalf of ACSA and SACAA continues, may interpret the said provisions differently, which translates into reasonable prospects of success on appeal.

[8]. The applicants oppose the applications for leave to appeal *inter alia* on the basis that my order of 5 November 2024 is not appealable as being interim and interlocutory in nature.

[9]. In *City of Tshwane Metropolitan Municipality v Afriforum and Another*¹ (*Afriforum*), the Constitutional Court held that appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. The over-arching role of the interests of justice considerations, so the Constitutional Court held, has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court,

¹ *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 297 (CC) para 40.

in determining appealability. The court accordingly concluded that whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.

[10]. On the basis of this authority, I conclude that my judgment of 5 November 2024 is indeed appealable. The important point is that the court should be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review.

[11]. As contended on behalf of ACSA and SACAA, a finding that my judgment in this matter is appealable and granting leave to appeal would best serve the interests of justice. That means that my judgment is indeed appealable.

[12]. The next question to be considered by me is whether or not ACSA and SACAA satisfy the test on applications for leave to appeal, which is now governed by s17 of the Superior Courts Act 10 of 2013, cite in the relevant parts *supra*.

[13]. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. Even if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes.

[14]. In their applications for leave to appeal ACSA and the SACAA contend that I erred in my finding that ACS has the right and obligation to provide HBS at ACSA airports and that I erroneously relied on Civil Aviation Technical Standards ('CATS'), to the exclusion of the empowering Act, that being the CAA Act, Civil Aviation Regulations ('CARS'), the Chicago Convention and the ACSA Act.

[15]. There are a number of further grounds on the basis of which, according to ACSA and the SACAA, leave to appeal should be granted.

[16]. Nothing new has been raised by the applicants in this application for leave to appeal. In my original written judgment, I have dealt with most, if not all of the issues raised by ACSA and the SACAA in their applications for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I say in the judgment, namely that, in my view, the Airlines (and therefore ACS) are responsible for HBS. Whether I am correct in this finding is not an issue which needs to be decided definitively at this stage. I am however of the view that 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.

[17]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success'.

[18]. In *Ramakatsa and Others v African National Congress and Another*², the SCA held that the test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law that a court of appeal ‘could’ reasonably arrive at a conclusion different to that of the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[19]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[20]. In *Mont Chevaux Trust v Tina Goosen*³, the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*⁴. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by

² *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

³ *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

⁴ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁵.

[21]. I am persuaded that the issues raised by ACSA and the SACAA in their applications for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeals, therefore, in my view, have reasonable prospects of success.

[22]. Moreover, as contended on behalf of ACSA and the SACAA, there are indeed compelling reasons why the appeal should be heard. It is so that my judgment of 5 November 2024 addresses matters of great public importance and has far-reaching consequences. The case relates to the manner in which ACSA exercises its statutory and Constitutional powers and functions. Those functions concern aviation safety and South Africa's international obligations in terms of the Chicago Convention.

[23]. ACSA and the SACAA have therefore satisfied the requirements of s17(1)(a)(i) and (ii) of the Superior Courts Act and leave to appeal should therefore be granted. In that regard, I have been urged to grant leave to appeal to the Supreme Court of Appeal due to the importance of the issue to all the litigants. I disagree. Leave to the Supreme Court of Appeal is not warranted in view of the fact that the application was only for interim relief.

⁵ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

The Applicants' Section 18 Application for Declaratory Orders

[24]. The applicants seek urgent relief for execution of paragraphs (5) and (6) of the court order of 5 November 2024 and a declaratory order that the implementation and the operation of the said order are not suspended pending applications for leave to appeal and appeals.

[25]. ACSA and the SACAA oppose the said application *inter alia* on the basis that same lacks urgency. There is no merit in this ground of opposition for the simple reason that in the original application the Court found that the applicants are entitled to the relief sought by them on an urgent basis. It follows that the execution of the order granted pursuant to such an application would axiomatically be urgent. I therefore find that the applicants' application is indeed urgent.

[26]. ACSA and the SACAA furthermore contend that the applicants seek the foregoing relief in circumstances where there are no exceptional circumstances that warrant such far reaching relief. In addition thereto, so the contention goes, the applicants have failed to indicate any harm, let alone irreparable harm that it stands to suffer if the impugned court order is not put into operation. The absence of such harm is indicated, so the argument continues, by the common cause fact that the Original Equipment Manufacturer ('OEM") that is responsible for the service and maintenance of the equipment which ACS seeks to replace – an entity by the name of 'Smiths', has agreed to extend its service contract until May 2025, in line with its standing commitment to support airport operations during the interim period until the upgrade and replacement of the HBS equipment, and to continue to provide the necessary support and maintenance of the equipment.

[27]. The applicants' application is based on s 18(2) of the Superior Courts Act, which provides that '... unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is *an interlocutory order not having the effect of a final judgment*, which is the subject

of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal' (emphasis added).

[28]. ACSA and the SACAA contends that the orders (5) and (6) are not mere interlocutory orders but are final in effect, as they *inter alia* prevent ACSA from performing its statutory powers, duties and functions in terms of *inter alia* s 51 of the PFMA and ss 4 and 5 of the ACSA Act, to decide on how HBS services must be rendered and how any service and facility at the airport is to be performed. Once ACS is allowed to replace the back-up units in contravention of s 51 of the PFMA and s 217 of the Constitution, so the contention goes, this will constitute unlawful conduct that becomes irreversible.

[29]. It is therefore contended on behalf of ACSA and the SACAA that the declarator sought by the applicants stands to be dismissed, as the orders issued by me on 5 November 2024 are clearly orders as contemplated in s 18(1) and not s18(2) of the Superior Courts Act.

[30]. I disagree with these contentions by ACSA and the SACAA and I do so for the simple reason that, as contended by the applicants, the purpose for granting the mandamus enunciated in the Court's judgment would be entirely undermined if the contentions of the SACAA and ACSA were upheld – namely that applications for leave to appeal had the effect of suspending the mandamus. Moreover, the mandamus is interim and had the effect simply of maintaining the *status quo ante* – it is not final in nature and/or effect.

[31]. ACSA and the SACAA contends that the impugned orders (5) and (6) are final in effect because the interdict against the tender prevents ACSA from exercising its statutory powers. Specifically, the mandamus prevents ACSA from exercising its statutory powers in terms of s 51 of the PFMA and sections 4 and 5 of the ACSA Act. This contention is without merit. Whether an order interferes in the exercise of statutory powers has nothing to do with how final or interim it is. Moreover, the merits of ACSA's case – that the decision of the Court was wrong – cannot turn the order from an interim order into a final one.

[32]. I conclude, for all these reasons, that a proper case for the declarator is made out by the applicants.

[33]. As regards ACSA's conditional counter-application, I am of the view that same falls to be dismissed. No case is made out by ACSA or the relief sought in the counter-application.

[34]. As submitted on behalf of the applicants, ACSA does not get out of the starting blocks with its s 18(3) counterapplication. The irreparable harm alleged by SACS, namely the separation of powers harm, is not the irreparable harm contemplated in section 18(3) of the Superior Courts Act. More fundamentally, ACSA does not address a requirement of its relief – that being that ACS will not suffer irreparable harm. It fails to address this, and it is impossible, in light of the Court's findings in this regard, referred to above, for ACSA to make out this element. It fails to address harm to the public interest. In particular, ACSA fails to grapple with the public interest harm (the possible unlawful expenditure) found by the Court in paragraph 40 of the judgment and the further harm to the public interest and ACS found by the Court in paragraph 41 of the judgment.

[35]. It bears emphasising that there cannot possibly be any harm – whether that be to ACSA, to the South African public in general or to the aviation industry in South Africa, if the orders (5) and (6) are enforced before the hearing of the review application. In that regard, there will be no costs to ACSA or the public purse as the expenses relating to the installation of the back-up units will be for the account of ACS. For this reason alone, the counter-application falls to be dismissed.

Order

[36]. In the circumstances, the following order is made:

- (1) The first respondent is granted leave to appeal to the Full Court of this Division.

- (2) The costs of the first respondent's application for leave to appeal shall be costs in the appeal.
- (3) The fourth respondent is granted leave to appeal against paragraph (6) of the Order of this Court dated 5 November 2024.
- (4) The costs of the fourth respondent's application for leave to appeal shall be costs in the appeal.
- (5) The applicants' application for declaratory relief in terms of section 18 of the Superior Court Act 10 of 2013 succeeds with costs.
- (6) It is declared that the orders in paragraphs (5) and (6) ('the mandamus') of the order of this Court dated 5 November 2024 are operative and are not suspended by the first respondent's (ACSA's) and the second respondent's (the SACAA's) applications for leave to appeal or appeals.
- (7) ACSA and SACAA be and are hereby ordered and directed to comply with the mandamus within ten days from date of this order.
- (8) ACSA and SACAA shall pay the applicants' costs of the section 18 application, jointly and severally, the one paying the other to be absolved, which costs shall include the costs consequent on the employment of two Counsel, one being Senior Counsel, on the scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.
- (9) ACSA's conditional counter-application is dismissed with costs.
- (10) ACSA shall pay the applicants' costs of the conditional counter-application, which costs shall include the costs consequent on the employment of two Counsel, one being Senior Counsel, on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.



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

HEARD ON:	25 February 2025
JUDGMENT DATE:	28 February 2025 – 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