

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 119918/2023

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

2 May 2025

DATE

SIGNATURE

In the matter between:

**AIRPORTS COMPANY SOUTH AFRICA SOE
LIMITED**

FIRST APPELLANT

SOUTH AFRICAN CIVIL AVIATION AUTHORITY SECOND APPELLANT

And

**AVIATION CO-ORDINATION SERVICES (PTY)
LIMITED**

FIRST RESPONDENT

JUDGMENT

TWALA J (DLAMINI et MFENYANA JJ concurring)

Introduction

- [1] This is an appeal brought by the appellants in terms of section 18(4)(ii) of the Superior Courts Act¹ (*“the Act”*) against the order of Adams J granted on 28 February 2025 which made the orders 5 and 6 of Adams J’s judgment of 5 November 2024 immediately operational and executable.
- [2] There are two central issues for determination in this appeal which are: First is whether the orders 5 and 6 of Adams J’s judgment of 5 November 2024 are interim or final in nature and effect; and secondly, if they are interim in nature and effect whether they are subject to an appeal in terms of section 18(4)(ii). Put in another way, whether this Court has the requisite jurisdiction to determine this appeal under the remit of section 18(4)(ii).
- [3] I propose to refer to the first appellant as ACSA and the second appellant as SACAA and jointly as the appellants. The first respondent shall be referred to as ACS and since the second and third respondents do not play any part in these proceedings, I will refer only to ACS when dealing with the respondents.

¹ 10 of 2013.

Factual Background

- [4] The genesis of this appeal arises from a decision taken by ACSA on 18 May 2023 which was confirmed by the Minister of Transport on 8 September 2023 to terminate ACS's provision of the hold baggage system ("*HBS*") service at its airports and to insource these services. On 16 November 2023 ACS launched a review application to review and set aside these decisions of ACSA terminating the long-standing contract between the parties, including the decision to insource baggage reconciliation system ("*BRS*") or baggage management system ("*BMS*").

- [5] On 17 and 20 May 2024 ACS received notice of termination from ACSA together with a notice that ACSA would issue a tender for the provision of these services for the sum of R3.15 billion. This galvanised ACS to launch the urgent application to interdict ACSA from proceeding with the tender pending the final determination of the review process. Further, ACS sought an order to allow it to replace four level 3 back-up units with new back-up units at OR Tambo International Airport and King Shaka International Airport, and that SACAA approve the replacement of the back-up units.

- [6] On 5 November 2024 the court a quo granted an interim interdict against ACSA preventing it from adjudicating and taking any steps in relation to the tender it issued in May 2024 for the provision of HBS services, and otherwise implementing the 2023 insourcing decision; that ACSA should allow ACS to replace the four back-up units at OR Tambo and King Shaka International Airports; and that SACAA should approve the replacement of these back-up units. All of these orders were to be operational pending the finalisation of the review proceedings.

- [7] Dissatisfied with the judgment and order of 5 November 2024, the appellants launched an application for leave to appeal and a conditional application to

suspend the operation and executability of the orders pending the appeal process. On 28 February 2025 the Court a quo granted ACSA and SACAA leave to appeal but declared that orders 5 and 6 of its judgment of 5 November 2024 were interim pending the finalisation of the review process and dismissed the conditional counter application to suspend the operation and executability of orders 5 and 6. This prompted the appellants to bring this urgent appeal in terms of section 18(4)(ii).

Submissions by the Parties

- [8] ACS contended that the appellants have failed to meet the requirements for bringing this appeal under the provisions of section 18(4) of the Act. There has been no order as required for such an appeal. The court a quo did not order otherwise as contemplated in section 18(1) of the Act. The purported appeals by the appellants in terms of section 18(4) of the Act are incompetent and should be dismissed.
- [9] Further, ACS contended that the declaratory order related to section 18 of the Act as it concerned the status of the first order as either interim or final and therefore not suspended or suspended in terms of section 18 – hence the court a quo referred to it as being in terms of section 18 of the Act. To state it otherwise, it is undeniable that the court a quo did not make executable an order that was otherwise suspended in terms of section 18(1) of the Act which would have triggered the right of automatic appeal under section 18(4).
- [10] The appellants contended that the test to determine whether an interim order is appealable or not is whether it is in the interests of justice for the litigant to be granted leave to appeal. In its determination, the court should consider amongst others whether there are prospects of success, whether the decision, although interlocutory, has a final effect and whether irreparable harm would ensue if leave to appeal is not granted.

[11] The appellants contended further that orders 5 and 6 are final in nature in that they prevent the appellants from executing their statutory function as conferred by the legislation. The interdict prevents ACSA from acting in terms of the Public Finance Management Act² and section 217 of the Constitution³. Further, the mandamus usurps the powers of SACAA of executing its functions to regulate safety in aviation.

Legal Framework

[12] It is apposite at this stage to restate the provisions of section 18 of the Superior Courts Act which provide as follows:

“Suspension of decision pending appeal:

- 18.(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to subsection (3), 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.
- (3) A court may only order otherwise as contemplated in subsection (1) and (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If the court orders otherwise as contemplated in subsection (1) –
 - (i) the court must immediately record its reasons for doing so;

² Act 1 of 1999.

³ Constitution of the Republic of South Africa, 108 of 1996.

- (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
 - (iv) such order will be automatically suspended, pending the outcome of such appeal.”
- (5) ...

[13] Furthermore, to put matters in the correct perspective, it is convenient to mention the order of 28 February 2025 as it forms part of the discussion which is the following:

- “(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 counterapplication is dismissed with costs.
- (10) ACSA shall pay the applicants’ costs of the conditional counterapplication, 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.

Discussion

[14] It is trite that when the jurisdiction of the Court is challenged by one of the parties, it must be determined first since it forms the basis for the court's power to determine the issues between the parties. In determining whether the Court has the requisite jurisdiction to adjudicate the matter, the Court must consider the pleadings as a starting point.

[15] In *Competition Commission of South Africa v Standard Bank of South Africa Limited*⁴, the Constitutional Court stated the following:

“Boqwana JA was correct to find that the rule 53 record may be relevant to jurisdiction, since the test for assessing the jurisdiction of the Competition Appeal Court in a review application is connected to the grounds of review. This does not, however, imply that jurisdiction should not be established up front on the basis of what is pleaded in the founding papers. The court chosen by an applicant in a review application must be able to assert its jurisdiction on the basis of the founding papers. Where no facts are alleged in the founding papers upon which jurisdiction could be founded, the applicant is not entitled to the production of the record in the hope that it will help clothe the court with the necessary jurisdiction. Standard Bank was required to first establish jurisdiction in its founding papers before the Competition Appeal Court could direct the production of a rule 53 record. As mentioned, the question of jurisdiction has not yet been adjudicated by the Competition Appeal Court. Boqwana JA should not have directed that the rule 53 record be produced without first deciding whether the Competition Appeal Court was competent to hear the review application as a court of first instance.”

[16] Undoubtedly, section 18(1) of the Act confirms the common law principle that a final order is suspended pending an application for leave to appeal or an appeal of that order, whereas section 18(2) provides that interim orders remain in full

⁴ [2020] (4)- BCLR 429 (CC) para 119

force and effect pending an application for leave to appeal or an appeal of that order. Put differently, section 18(2) provides that interim orders are not suspended and remain effective, operational and executable. A court may order differently under both sections if certain requirements are met, that being firstly, exceptional circumstances warranting the deviation and, irreparable harm to the party seeking the deviation together with the absence of irreparable harm to the other party.

[17] In *Ntlemeza v Helen Suzman Foundation and Another*⁵ the Supreme Court of Appeal stated the following when it was dealing with section 18 of the Act:

“In order to embark on a determination of whether the preliminary jurisdictional point raised on behalf of General Ntlemeza, set out in para 17 above, has substance, it is necessary to consider the provisions of s 18(1) and (2). These sections provide for two situations. First, a judgment (the principal order) that is final in effect, as contemplated in s 18(1): In such a case the default position is that the operation and execution of the principal order is suspended pending ‘the decision of the application for leave to appeal or appeal’. Second, in terms of s 18(2), an interlocutory order that does not have the effect of a final judgment: The default position (a diametrically opposite one to that contemplated in s 18(1) is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. This might at first blush appear to be a somewhat peculiar provision as, ordinarily, such a decision is not appealable. However, this subsection appears to have been inserted to deal with the line of cases in which the ordinary rule was relaxed referred to in para 20 above⁶.

Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position. It is uncontested that the high court’s judgment on the merits of General Ntlemeza’s appointment is one final in effect and therefore s 18(1) applies. This section provides that the operation and execution of a

⁵ 2017 (5) SA 402 (SCA)

⁶ Id para 25

decision that is the ‘subject of an application for leave to appeal or appeal’ is suspended pending the decision of either of those two processes. Section 18(5) defines what the words ‘subject of an application for leave to appeal or appeal’ mean: ‘a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules⁷.’

[18] It is my respectful view therefore that, for a party to be able to invoke the provisions of section 18(4) of the Act, it should demonstrate to the court that there was an order made in terms of section 18(1). Section 18(4) can only be engaged if the Court made an order in terms of section 18(1) or has ordered otherwise in terms of section 18(3).

[19] It is indisputable and has been confirmed by both appellants at the hearing of this appeal that the appeal is brought as an urgent appeal in terms of section 18(4) of the Act. As indicated above, the automatic right of appeal on an urgent basis as provided for under section 18(4)(ii) of the Act is only engaged if the appellants have demonstrated that an order was made in terms of section 18(1) of the Act. The appellants have failed to do so as the orders 5 and 6 of the judgment of 5 November 2024 are interim and fall within the realm of section 18(2) of the Act.

[20] It is apparent from the record that orders 5 and 6 of the judgment of 5 November 2024 were interim in nature and effect as they were made pending the finalization of the review proceedings. Further, in the judgment of 28 February 2025, although the Court granted the appellants leave to appeal, orders 5 and 6 were declared to be interim orders pending the finalization of the review proceedings and were made operational and executable by operation of the law.

⁷ Id para 26

[21] Since the Court dismissed the application in terms of section 18(3) to suspend the operation and executability of orders 5 and 6, in other words, the Court did not order otherwise in relation to orders 5 and 6, this Court lacks the requisite jurisdiction to determine this urgent appeal. The irresistible conclusion is therefore that the appellants have failed to meet the jurisdictional requirements to invoke the provisions of section 18(4) in order for this Court to determine this urgent appeal.

[22] In the premises, the following order is made:

1. The first and second appellants' appeals are dismissed.
2. The first and second appellants, jointly and severally, the one paying the other to be absolved, are to pay the costs of the urgent appeal, such costs to include the costs of two counsel, one of which is senior counsel, on scale C.



TWALA M L

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Heard On: 25 April 2025

Date of Judgment: 2 May 2025

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Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 2 May 2025.