

IN THE HIGH COURT OF SOUTH AFRICA /ES
(TRANSCAAL PROVINCIAL DIVISION)

CASE NO: 5113/05

DATE: 2/9/2005

not reportable

IN THE MATTER BETWEEN

WILLEM JOHANNES CLAASE

APPLICANT

AND

THE INFORMATION OFFICER OF
SOUTH AFRICAN AIRWAYS

RESPONDENT

JUDGMENT

SERITI, J

This is an application brought by the applicant against the respondent.

In terms of the notice of motion, the applicant is seeking an order against the respondent that:

1. Respondent should give access to and allow the applicant to inspect records and/or documents which are in the possession of the respondent, which indicate:

- 1.1 the number of seats which were available to be booked in both the business and economy class sections on flight SAA 204 on 15 August 2004 from JF Kennedy Airport, New York to Johannesburg;
- 1.2 the number of seats booked by passengers on both the business and economy class sections of flight SAA 204 on 15 August 2004 for the flight mentioned in 1.1 above;
- 1.3 the number of passengers who accepted their bookings on the above-mentioned flight;
- 1.4 the number of passengers who upgraded their flight status from economy to business section at JF Kennedy Airport, New York, on the flight and date mentioned above.

2. Costs of action.

2. The Act

This application is brought to court in terms of section 78(2)(d)(1) of the Promotion of Access to Information Act 2 of 2000.

The said section provides that a requester of information who is aggrieved by a decision of the head of a private body to refuse a request for access may, by way of an application, within thirty days apply to a court for appropriate relief.

Section 50 of the said Act reads as follows:

"Right of access to records of private bodies

- (1) A requester must be given access to any record of a private body if-
 - (a) that record is required for the exercise or protection of any rights;
 - (b) the person complies with the procedural requirements in this Act relating to a request for access to that record ..."

Section 53 reads as follows:

"Form of request – (1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address."

3. Information as contained in the founding, answering and replying affidavits

It appears on the papers that the parties, for the purposes of this application, are *ad idem* that the respondent is or should be regarded as a private body.

3.1 Founding affidavit

In the founding affidavit, the applicant alleges, *inter alia*, that he was in the employ of the respondent and its predecessor in title as a pilot for about thirty years, and he retired on 1 April 2001 and went on pension.

Prior to his retirement the trade union which represented the pilots and management of the respondent entered into a certain agreement dealing *inter alia* with benefits of retired pilots.

Relevant portions of the said agreement were attached to the papers as an annexure.

In terms of the said agreement the applicant is entitled, amongst others, to two confirmed international 100% rebated tickets and two such tickets for his companion.

Clause 1.7 of the said agreement reads as follows:

"Confirmed reservations may be made up to 90 days in advance in respect of the above 100% rebated tickets.

Such reservations constitute a contractual right and the holders of such confirmed reservations shall not be offloaded under any circumstances at any time."

Clause 1.8 of the said agreement reads as follows:

"... Confirmed reservations may be made up to 90 days in advance in respect of the 100% rebated ... international tickets. All other tickets are granted on a seat available basis ..."

During August 2004 the applicant was in New York, USA together with his companion. On 14 August 2004 whilst still in New York he lost his credit card. After he lost his credit card, he decided to come back home.

He was in possession of two business class tickets issued by the respondent. The said tickets entitled him and his companion to fly business class on a SAA flight.

The applicant in his founding affidavit alleges that the said tickets were not for a specific flight as they were part of the concession tickets he was entitled to and he could book in advance on any flight.

He requested his brother in law, who stays in Florida, USA to book him and his companion a seat on a SAA flight from New York to Johannesburg.

A representative of the SAA in New York refused to make a booking for them over the telephone. Applicant went to the SAA desk at JF Kennedy Airport, New York to make a booking of two business class seats on the SAA's New York-Johannesburg flight.

On his arrival at the said desk, he produced his two business class tickets and the SAA representative advised him that he (the applicant) cannot be allocated the requested two seats before the counter closes. He was told that despite the fact that some other person had earlier advised him that there are seats available in the business class, and the applicant alleges that that was contrary to his rights as contained in the agreement between his trade union and management of SAA referred to above.

Applicant further alleges that in such a case the normal procedure is that seats are allocated on a first come first serve basis.

Despite the fact that they arrived first, they were put last on the queue. There are passengers who were upgraded from economy class to business class.

When they were ultimately served they were told that there is only one business class seat and one economy class seat available. He advised them that he is not interested in the said seats and they went back to the hotel.

On 16 August 2004 he phoned the SAA offices in Johannesburg from New York in connection with a flight from New York to Johannesburg on the said day. He was informed that there are six seats available in the business class and he booked two business class tickets through the Johannesburg office.

They went to JF Kennedy Airport and on arrival at the desk of SAA a representative of SAA informed him that there are no seats available in the business class. He advised the said representative that he had reserved two seats via the Johannesburg office.

They boarded the SAA flight from New York to Johannesburg travelling business class on the said date.

Applicant further alleges that from the above it appears that SAA committed a breach of contract in so far as they refused to reserve two business class seats for him, to which he was entitled, and which seats were available when he arrived at JF Kennedy Airport on 15 August 2004.

He intends instituting an action for damages resulting from the said breach of contract and also to take steps to prevent further occurrence of such an incident. He was informed by other pilots that same treatment was also meted out to them.

He contacted a representative of SAA, a certain Mr Michael Brewis, and enquired from him about certain records he was looking for. The said Mr Brewis advised him that he first requires authorisation from Client Services to make the said records available to him.

In the light of the above information on 25 August 2004 he directed a request to Client Services requesting information about the number of available seats in business class on 15 August 2004 on a flight from New York – he made the said request by e-mail. The said e-mail is dated 25 August 2004 and reads as follows:

"The ground staff at JF Kennedy Airport, New York informed me on Sunday the 15th August 2004 at 13:45 local time that a certain quantity of seats in the business class section of SA 204 which departed later that day from New York to Dakar to Johannesburg, had not been booked and were therefore still available.

Unfortunately I have forgotten what that quantity was. Can you please provide me with this figure as a matter of urgency? I require this figure for the purpose of resolving a dispute."

He later received a reply to the effect that when the said flight left New York there was only one business class seat available.

The applicant further alleges that the said information was not the information he requested. He then informed SAA staff that the information he is requiring is information relating to the availability of seats in business class on the said date and flight as at 13:45.

Several e-mails were exchanged between SAA officials and him, but he did not receive the requested information.

On 5 November 2004 he sent to SAA a form prescribed in terms of section 53(1) of the Act, requesting certain information. The said form, *inter alia*, required him to set out in detail the records/information he was requesting.

He attached to the said form an attachment detailing the information and/or records he is requesting.

The said attachment reads as follows:

" AANHANGSEL TOT VORM B
Artikel 53(1) van die WET OP BEVORDERING VAN TOEGANG TOT
INLIGTING, 2000 (WET NO 2 VAN 2000); (Regulasie 4)

D. Besonderhede van Rekord

1. Beskrywing van rekord of toepaslike gedeelte van die rekord:

1.1 Die rekord wat die getal sitplekke aandui wat bespreekbaar was in die besigheidsklas en die getal sitplekke wat bespreekbaar was in die ekonomieseklas van vlug SA 204 op 15 Augustus 2004 vanaf JF Kennedy, New York na Johannesburg.

1.2 Die rekord wat die getal sitplekke aandui wat deur passasiers bespreek was in die besigheidsklas en die getal sitplekke wat deur passasiers

bespreek was in die ekonomiese klas van vlug SA 204 op 15 Augustus 2004 vir die sektor New York-Johannesburg en vir die sektor Dakar-Johannesburg.

1.3 Die rekord wat aandui watter getal passasiers, met verwysing na die passasiers na verwys in paragraaf 1.2, vir die onderskeie vlugte opgedaag en hul bespreekte sitplekke op die vlugte opgeneem het.

1.4 Die rekord wat aandui watter getal passasiers vanaf ekonomiese klas na besigheidsklas opgegradeer is te New York op die vlug SA 204 op 15 Augustus 2004."

The prescribed form, to which the previously mentioned attachment was attached, asked the requester of information or record the following questions and the requester responded as follows to the said questions:

Question – Description of the Record or relevant part of the record?

Answer – "Verwys na die aangehegte bladsy met opskrif 'Aanhangsel tot vorm B'."

Question – Indicate which right is to be exercised or protected.

Answer – "My reg om sitplekke in die eersteklas of besigheidsklas afdeling op vlugte van SAA toegeken te word."

Furthermore the requester of information was asked to explain why the requested records are required for the exercising or protection of the aforementioned rights and the response the requester gave was the following:

"Die inligting sal aandui dat ek my regte ontnem was op vlug 204 op 15 Augustus 2004. Dit sal gebruik word om te voorkom dat dit weer gebeur in die toekoms."

Applicant alleges that he later received correspondence dealing with the number of seats which were booked in both business and economy classes and the number of people who took their seats in both classes at the time of departure of the said flight, but he was not given the number of people who arrived to take their reserved or booked seats and the number of people who were upgraded from economy to business class.

He believes that the information he is requesting is available and that Mr Brewis on 29 September 2004 advised him that the information he (the applicant) is requesting is with Client Services.

3.2 Answering affidavit

In the answering affidavit the deponent thereof alleges *inter alia* that:

1. the applicant has failed to show that the information sought is required for the exercise or protection of a right;
2. the information sought has already been provided to the applicant.

The said deponent further alleges that information that was requested by the applicant was supplied to the applicant by e-mail dated 21 February 2005, which information is the following:

1. number of seats available on the said flight in business class: 38
2. number of seats available in the economy class: 231
3. number of seats booked on the day of departure in economy class: 244
4. number of seats booked on the day of departure in business class: 37
5. number of seats taken up by passengers on the flight in economy class:
220
6. number of seats taken up on business class on the flight: 37
7. number of upgrades: 0

In the above-mentioned e-mail it was stated that there were no seats available for sale in the business class.

The respondent further alleges that the tickets which the applicant had on the day in question were issued for 30 August 2004, and the applicant had confirmed reservation for 30 August 2004 and consequently for the said day of 30 August 2004 the circumstances were governed by clause 1.7 of the agreement mentioned above. Applicant and his companion wanted to leave USA on 15 August 2004. They had no prior confirmed reservations for the said 15 August 2004, and consequently for the

purpose of their intended travel on 15 August 2004 they were not covered by the provisions of paragraph 1.7 of the agreement.

Their tickets were regarded as stand-by tickets for the purpose of their intended travel on 15 August 2004.

The procedure followed when a passenger has a stand-by ticket is that the ticket holder presents the ticket at the check-in counter and he/she is placed on stand-by. Once all passengers have been loaded and there are seats still available the stand-by passengers are then loaded, preference being given to full fare paying passengers.

The deponent of the answering affidavit further alleges that on 15 August 2004 the applicant and his companion could only be granted seats on a seat available basis as envisaged in paragraph 1.8 of the agreement mentioned above.

3.3 Replying affidavit

In his replying affidavit the applicant states that the information he is requesting is clearly set out in the annexure attached to the completed prescribed form which he attached to his founding affidavit.

He further pointed out that the information supplied to him is not in the format he requested. He requested a computer print-out or copy thereof and instead he was sent e-mails with certain information apparently obtained overseas.

Information he received from America is fabricated information which he never requested. Information he requested is in the possession of Mr Brewis in Johannesburg.

He refers to different e-mails he received from the respondent's officials giving different figures for the economy class passengers.

One of the attachments on the papers, filled by the respondent, alleges that there were no passengers who were upgraded from economy class to business class and the applicant alleges that the said attachment was received by him after launching this application and the said information is incorrect as he personally saw and heard how passengers who were booked in economy class were upgraded to business class whilst he was waiting to be served.

He further alleges that he received information from Mr Brewis to the effect that information obtained overseas might be incorrect and the correct information is in his (Mr Brewis') office.

Applicant further alleges that when a ticket is issued a date is inserted on the said ticket although that might not be the date on which the passenger will travel – the reason is that the SAA's system cannot handle "open-booking". When the ticket was issued to him he was asked the date of return and he could not provide the said date. The lady who was serving him then said that she is going to insert the date 30 August 2004 solely for

the purposes of their system. Confirmation of a booking takes place only when a person confirms that he/she will take a particular seat.

On 15 August 2004 the business class was not fully booked – there were seats available and the official of SAA at New York refused to allocate two seats to him.

4. Dispute between the parties

The dispute between the parties is whether the applicant has established that there is a right which he needs to exercise or protect as required by section 50(1) of the Promotion of Access to Information Act and if so, has the respondent supplied the applicant with the requested information which is necessary for applicant to exercise or protect his right.

4.1 Right which applicant needs to exercise or protect

As stated earlier the applicant in the prescribed form to be completed by requester for information described his right to be exercised or protected as his right to be allocated a first class or business class seat on SAA flights.

Clause 1.7 of the agreement between trade unions and management of SAA provides that the holder of a 100% rebated ticket, with confirmed reservation, has a right to be allocated a booked seat in first class or business class on the day the said passenger is booked to travel. The said clause 1.7, in my view, does not entitle the holder of a

100% rebated ticket to be allocated a seat in a first class or business class section of SAA flight, unless the holder of the said ticket has a confirmed reservation.

In a case where the said ticket holder does not have a confirmed reservation, the normal procedure applied by SAA in instances of stand-by tickets described above by the deponent of the respondent's answering affidavit applies.

In the present case the applicant and his companion did not have confirmed reservations to travel on 15 August 2004. They were, correctly so, treated as stand-by passengers. Later they were offered one seat in business class and one seat in economy class which offer the applicant rejected.

There is no clause in the agreement between the trade union and SAA which provides that the holder of a 100% rebated ticket should, without following the procedure utilised by SAA in instances where passengers have stand-by tickets, be offered a first class or business class seat.

In my opinion the applicant has failed to establish that he had a right to be allocated a first class or business class ticket on 15 August 2004, which right he needs to exercise or protect.

4.2 Has SAA supplied the applicant with requested information

In his founding affidavit the applicant stated that the information he requested from the respondent is clearly set out in the annexure to the prescribed form that he completed and sent to the respondent. The said requested information is clearly set out in the said annexure.

In his replying affidavit he confirmed that information he requested was detailed in the annexure mentioned above.

He further alleges that the information supplied to him is not in the format he requested as he requested a computer print-out or a copy thereof which information is in the possession of Mr Brewis in Johannesburg.

The question of the format in which he requires the requested information and that same should be obtained from Mr Brewis was not mentioned in the founding affidavit but was raised only in the replying affidavit.

In *Ferreira v Premier, Free State and Others* 2000 1 SA 241 (OFS) at 254B-C VAN COLLER, J said:

"It is the practice of our courts that an applicant must, generally speaking, make out a case in his founding affidavit and he cannot introduce for the first time in his

replying affidavit facts or circumstances on which he seeks to found a new cause of action."

See also *Shakot Investments v Town Council, Borough of Stanger* 1976 2 SA 701 (D&L) at 704E-G.

The applicant cannot qualify his request for information in his replying affidavit.

In his founding affidavit he clearly stated that the descriptions of information he requested is contained in the annexure to the prescribed form mentioned above.

The applicant further alleges that information about the upgrades from economy class to business class was only provided to him after launching the current application. He further alleges that the information provided to him at different times differs.

In my view, the information concerning economy class seats is irrelevant in so far as the applicant's alleged right to be allocated a first class or business class seat is concerned.

Applicant, if ever he had a right to be allocated a business class, the information relevant for him to protect the alleged right is information relating to business class.

He was informed that there were thirty eight seats available to be booked in business class and thirty seven of the said seats were booked and the said passengers took their booked seats. This means that there was only one seat available in the business class and the said seat was offered to the applicant and he refused to accept same.

Information relating to the number of passengers upgraded from economy class to business class is not relevant to the protection or exercise of the alleged right of the applicant.

Applicant cannot on any justifiable ground demand that the SAA should ignore its normal procedure which applies in case of stand-by passengers.

For all intends and purposes the applicant and his companion were stand-by passengers.

5. Conclusion

The applicant has failed to establish that he has a right which he needs to protect or exercise. Furthermore, he has failed to establish that respondent failed to provide him with information necessary for him to exercise or protect a right conferred on him by the agreement mentioned above.

The court therefore makes the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the respondent on a party and party scale.

W L SERITI
JUDGE OF THE HIGH COURT