IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 42402/2007

In the matter between:

GODDARD MARTIN THOMAS Applicant

and

COMMISSIONER FOR CIVIL AVIATION Respondent

JUDGMENT

SATCHWELL J:

Introduction

1. Officials of the Civil Aviation Authority (CAA) purported to "revoke" the instrument rating of the applicant who is an airline transport pilot. He seeks to review the decision to dismiss his appeal against the aforesaid "revocation".

2. The first issue is whether or not it is permissible to convert the testing and results of an in-house " operator proficiency test " on a particular aircraft to that of an "instrument proficiency rating" test as provided for in the Air Navigation Regulations?. The second issue is whether the CAA officials were authorized, in terms of the Air Navigation Regulations, to take the action which they purported to take?. The third issue is whether the procedures adopted by the CAA officials justify review as provided for in section 6 of the Promotion of Administrative

Justice Act (PAJA)? Finally, there is the question as to what remedies, if any, are available to the applicant?

3. The applicant was the holder of an Airline Transport Pilot licence[1] and employed as an airline transport pilot by a commercial company known as AirQuarius. During October 2005 he was about to fly an aircraft of a type he had not flown for some months and was therefore was required to undergo proficiency testing on such type of aircraft [2]. This was an in-house proficiency test[3] conducted by a pilot in the employ of AirQuarius. It is common cause that the test was conducted over 14th and 15th October 2005 and that the results[4] were, in a number of respects, marked "unsatisfactory"[5]. The response of the applicant's employers was to arrange for him to undergo a corrective training programme and further testing before he could fly this particular airplane.[6]

4. The CAA was informed of the unsatisfactory results of this in-house flight testing It is unknown exactly when the CAA received this information or the documentation to which it refers[7]. The CAA requested of AirQuarius that this information be placed before them "on CAA format"[8]. The pilot in the employ of AirQuarius, Capt. Webb, who had performed the in-house proficiency test was

[1] Issued to him in 1973.
[2] Described by Airquarius as a secondment "subject to his passing a reactivation of his F28 proficiency. This reactivation was due to his not having flown the F28 for more than ninety days" – letter from Airquarius to the CAA.
[3] Described by Airquarius as a "proficiency test" in its letter to the CAA. The respondent accepts that this was "an in-house proficiency test" – see para 21 of the respondents answering affidavit.
[4] Page 14
[5] Page 137
[6] There appears to be some dispute whether or not this further training was ever completed but I do not have to decide this issue.
[7] In para 16 of its answering affidavit the respondent states that it received copies of the documents relating to the applicants failed proficiency test and then refers to a report addressed to the authority by the Chief Pilot of Airquaraius dated 2 December 2005 – no such document is attached to the affidavit. The report from Captain Webb is undated.
[8] Letter from the CAA to the applicant dated 22nd December 2005.

also an official examiner of the CAA.[9] On an unknown date in December 2005, Webb prepared a document for the CAA on the CAA form 61-166 entitled "Instrument Rating Proficiency Test" [10] which he backdated to 14 October. It is not known if this document was prepared before or after the meeting held by the CAA with Goddard on 13th December.

5. On 13th December 2005 a meeting of the CAA was convened to which the applicant was invited. At that meeting, he was (according to the applicant) informed that he had "failed his instrument rating test"[11] or (according to the respondent) invited to "discuss the applicants failure of his proficiency of operating an aircraft under instrument flight conditions during the test on 15th of October 2005".

6. On that same date the applicant was informed by the CAA that his "instrument rating is hereby revoked in terms of the Air Navigation Regulations 1.13 and 3.12 (4)" and that "therefore you may not exercise the privilege of your Airline Transport License no 02701643" [12]. An appeal was noted against this decision. Only after litigation did the respondent either hold an appeal or furnish a decision and, on 10th May 2007, reasons for the decision to dismiss the appeal were supplied [13] .

7. At this hearing, the respondent attempted to argue that there are a number of material disputes of fact which could not be decided on the papers and that this matter should be referred to evidence. I found this not to be so. The suggested

[9] Respondents Answering Affidavit para 10.
[10] Page 138
[11] Page 44 of the applicants founding affidavit;
[12] Letter dated 13 December 2005 from the CAA to the applicant, Annexure at page 44 of the applicants founding affidavit.
[13] The dates are confusing and contradictory. The respondents decision is dated 6 February 2006 but the request for reasons refers to a decision dated 6 February 2007..

disputes were whether the applicant was aware that he had failed the test; whether and when the applicant had been informed by his employers that he had been grounded; whether there was a problem with the applicants instrument flying capabilities and whether he had passed a retest; whether the applicant was handed certain documents in December 2005. These are not issues which are relevant to this review or which this court must decide. Other suggested disputes are issues of some importance: whether the instrument rating test was included as part of the in-house proficiency test; whether the applicant was fit to exercise the privileges under a license, whether the CAA was empowered to withdraw the applicants instrument rating; whether Kingsburgh acted on the basis of incorrect facts. These are not disputes of fact. These are determinations which this court must make as a matter of law as to the powers and competencies of the CAA and the procedures which it adopted in dealing with these issues.

Conversion of one test to another?

8. Applicant challenges whether the in-house proficiency test which he underwent (and failed) can indeed be construed as a "instrument rating test". He points out that his instrument rating was still valid until the period 22 March 2006[14]. He further points out that the test undergone at AirQuarius was an in-house test conducted to ascertain his proficiency on a Fokker 28 aircraft simply because he had not flown this aircraft for several months. The remedy to his failure was perceived by his employer as being remedial training and further testing.[15].

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9. The question is whether or not such in-house proficiency test be said to constitute a CAA instrument rating test?

[14] Page 17
[15] See CAA letter page 47 confirming in-house nature.

10. I note a number of factors in this regard. First, the tests are different identified – the one is an in-house "operator proficiency test"[16] whilst the other is an "instrument rating proficiency test. Second, the different tests are undergone for different purposes. Third, the tests are conducted under the aegis of different entities. Fourth, the tests are conducted in accordance with and the results recorded on different forms. Fifth, the results of the test have different import: failure in the one leads to in-house remedial training while failure of the other may lead to action in terms of the Aircraft Regulations. Six, there is no evidence before me that the contents of the in-house operator proficiency test are exactly similar to or identical with those of an instrument rating proficiency test. At most there is the respondents averment that the AirQuarius operational proficiency test check form "contains reference to instrument proficiency as part of the relevant proficiency check"[17] [my underlining]. Seventh, the testing process and the results thereof are recorded in more than different formats – the identification of the tests is different. Eighth, there is no evidence before me that those portions of the in-house proficiency test failed by the applicant are exactly congruent with those portions of the instrument rating test provided for by Aircraft Regulations.[18] Nine, annexure A to the Regulations requires payment to be made to the CAA in respect of the instrument rating test whereas no such provision is made in respect of in-house flight checks.

11. Accordingly, I cannot accept the bare equation of the one test with the other or the attempt by the CAA to convert the one test to another.

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[16] See letter from the CAA dated 22nd December 2005 and the other references to which the judgment has referred.
[17] Para 14 of the respondents answering affidavit and paragraph D 6.1.1 (b) of the respondents reasons for dismissing the appeal.
[18] Scrutiny of the documents may tend to suggest a particular result but I am no expert in this regard and there is no evidence to this effect.

12. Furthermore, I doubt that it is possible to convert an in-house proficiency testing to a statutorily required instrument rating test. On that argument, pupils in standard ten at school would sit a school examination on their entire years syllabus commonly known as 'trial matric' and then be told that they had failed matriculation because the same teachers who taught and marked the school examinations were also qualified and used by the Matriculation Boards to mark those examinations. Similarly, a medical practitioner who is subject to monitoring by the hospital at which he or she works may find an unsatisfactory appendicectomy operation converted into a revocation of his or her registration with the Health Professionals Council.

13. This should, appropriately, have formed the subject matter of a properly constituted hearing before the CAA where the views of both the CAA and the applicant could have been aired and attempted to be proven and then adjudicated upon. In correspondence prepared by the applicant immediately after the 'revocation' of his rating and in his appeal, these were the very issues which the applicant sought to air.

Power of the CAA

14. In 'revoking' the applicants instrument rating, the CAA purported to act in terms of regulations 1.13 and 3.12(4) of the Air Navigation Regulations..

15. Regulation 1.13 deals with "suspension of licenses, certificates or ratings" and subregulation 1.13.1 provides for the suspension of a license or rating for a

specified period if the CAA believes this to be "necessary in the public interest". Such suspension may not endure "longer than 14 days"[19].

16. Clearly the CAA acted beyond the authority conferred in this subregulation and could not act in terms thereof. The CAA purported to 'revoke' an instrument rating whereas the subregulation permits only a 'suspension'. The 'revocation' was for an unlimited period whereas a suspension may not exceed a period of 14 days without Ministerial approval. The 'public interest' was not apparently canvassed at the meeting on 13th December 2005, particularly not if there was disagreement as to whether an in-house proficiency check or an instrument rating test prescribed by regulation had been conducted in October.

17. Regulation 3.12 specially deals with 'instrument ratings' and subregulation 3.12(4) provides that on failure of the prescribed instrument rating test by a candidate seeking renewal of such rating, then the already extant rating shall expire.[20]

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[19] Airport regulation 1.13: (1) The Commissioner or an authorised person may suspend for specified period any licence, certificate or rating issued, reissued, renewed or rendered valid under these regulations whenever in his opinion such action is necessary in the public interest.
(2) The suspension of a licence, certificate or rating in terms of subregulation (1) shall be reported to the Minister who may either confirm or vary such suspension.
(3) Except with the approval of the Minister no suspension of a licence, certificate or rating shall remain in force for a period longer than 14 days.
(4) Notwithstanding the suspension of a licence or rating in terms of subregulation (1) the Commissioner may in terms of regulation 1.12(1) require the holder of such licence or rating to undergo the test or examinations prescribed and thereupon the provisions of that regulation shall *mutatis mutandis* apply: Provided that no licence or rating suspended in terms of subregulation (1) shall be restored prior to the expiration of the specified period except with the approval of the Minister.

[20] Regulation 3(12)(4): Should a candidate for the renewal of an instrument rating fail the test prescribed in subregulation (3) prior to the date of expiry of his instrument rating stated in his licence, such rating shall expire with effect from the date and time of the completion of the test:
Provided that the holder of a helicopter and aeroplane instrument rating may renew his instrument rating in both categories by passing the practical flight test in one category if he has passed the practical flight test in the other category on the previous renewal of such instrument rating: Provided further that the holder of a multi-engine class rating (aeroplane) may do the practical flight test in a single-engine aeroplane on every alternate renewal of such instrument rating.

18. Clearly the CAA acted beyond the authority conferred in this subregulation and did not act in terms thereof. The applicant had not sought renewal of his instrument rating. He had not complied with the requirements of subregulation 3.12(3). The CAA had not administered the tests prescribed in subregulation 3..12(3). T he CAA did not purport to note an 'expiry' of the rating but instead 'revoked' the rating.

19. After the applicant drew the attention of the CAA to its reliance upon the wrong regulations, the CAA then claimed that the action had been taken in terms of the provisions of regulation 1.8 (f) of the Air Navigation Regulations[21]. The reasons given for dismissal of the applicant's appeal also refers to "the appeal, lodged in terms of regulation 1.8(f) of the Air Navigation Regulations". The appeal referred to therein is an appeal in respect of action taken in terms of subregulation 1.8(f) [22]..

20. Insofar as this constitutes an attempt find some legal basis for the CAA's revocation of the instrument rating, reference to sub regulation 1.8(1)(f) is of little assistance. That subregulation permits an authorized officer to withdraw any " license" "on reasonable grounds". In the present instance it was not the license of the applicant which was withdrawn but his rating which was revoked.

21. The CAA attempted to equate a rating with a license in its letter of 30th March 2006 [23] but did not pursue this line of thought in its answering affidavit. In

[21] CAA letter of 30th March 2006.
[22] Regulation 1.8(1)(f): An authorised officer of inspector may at any time withdraw any licence or permit issued to any person under the Act or these regulations if there are reasonable grounds for believing that such person is unfit to be the holder of such licence or permit: Provided that the person affected by the withdrawal of such licence or permit may appeal to the Commissioner for the setting aside of the decision of the authorised officer or inspector.
[23] Wherein was stated " bearing in mind that a rating is closely associated with a licence and indeed forms part thereof in terms of the definition of 'rating' contained in regulation 1.3 of the Air Navigation Regulations 1976, promulgated in terms of section 22(1) of the Aviation Act No 74 of 1962. The

argument, respondents counsel submitted that reference to an incorrect section of the regulations was not material and did not invalidate the decision taken by the CAA. Neither the view of the CAA expressed in its letter of March 2006 nor counsel's submission can be sustained.

22. A proper reading of the regulations makes it quite clear that it is not permissible to revoke a rating on the grounds that this equates with withdrawal of a license. First, the regulations clearly distinguish between a rating and a license. A rating is defined and such definition reveals that the one is not the other.[24] Indeed the one can exist without the other. Throughout the regulations are found references which distinguish between ratings and licenses[25]. Secondly, the regulations make different provisions for CAA action in respect of licenses and ratings. The CAA appeared to have failed to have regard to those provisions in the regulations which permit action to be taken in respect of ratings - regulation 1.12 allows for suspension pending satisfactory retesting and regulation 1.13 allows for suspension for a defined period. [26] . 'Revocation' of the applicants rating by the CAA exceeded the authority in those regulations and is not authorized in terms of any other.

23. The submission that any error in citation of the empowering regulation was not material is without foundation. The authorities upon which reliance was placed

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withdrawal of a rating amounts, in our view, to the withdrawal of the licence. The withdrawal of a licence is regulation by regulation 1.8(f) of the said regulations. It has to be pointed out that no provision for the withdrawal of a rating exists in the stated regulation".

[24] "Rating" is defined as "an authorisation entered on or associated with a licence or certificate and forming part thereof, stating special conditions, privileges or limitations pertaining to such licence or certificate (graad)"

[25] Regulations in Chapter 1: 1.10(c) "license or rating", 1.11: " license or rating" , 1.12: "license or rating", 1.13: "license or rating", 1.14: "license or rating", 1.16: "license or rating". Regulations in Chapter 2: 2.1A: "license or rating", 2.3: "rating", 2.4: "ratings", 2.5 – 2.9D: "rating", 2.10 – 2.11A: "lilcense", 2.12: "license or rating", 2.13: "license or rating", etc etc etc

[26] Regulation 1.12 provides for retesting of the holder of a rating if it is thought that such person has failed to maintain the minimum standard required and allows for suspension of such rating until the holder meets the requirements for issue of the rating. Regulation 1.13 provides for suspension of a rating for defined periods if such action is necessary in the public interest.

make it clear that there must be an "enabling statute [that] grants the power to make the proclamation"[27]. In the present instance, the CAA have yet to show that there is any enabling regulation which empowered it to 'revoke' the applicants rating.

24. In the result this court can only find that the CAA purported to act in terms of one or more regulations which do not confer authority upon the CAA or anyone else to take such action which was therefore taken without lawful authority.

25. The consideration given on appeal by the Commissioner did not remedy the original error because the Commissioner on appeal found no regulation authorizing the action which had been taken nor did he make any attempt to bring the action of the CAA within the ambit of permissible authority by taking different action in respect of the applicants in-house proficiency check [28]. The Commissioner on appeal simply perpetuated that which had been wrongly done by his officials. His dismissal of the appeal misconstrued the power which had been conferred on him [29].

26. It is of no assistance to the respondent to refer to the applicants failure of the in-house proficiency test and stress that there are serious safety implications resulting therefrom. It is accepted that the respondent has responsibility "to control, regulate and promote civil aviation safety and security"[30].

27. However, at all times the CAA is required to act within its powers in terms of the regulations. It is required of the CAA that its exercise of its powers comply with the doctrine of legality. The CAA is "constrained by the principle that it

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[27] Latib v Administrator Transvaal 1969 (3) SA 186 T
[28] For instance suspension of the rating in terms of regulation 1.13 or requiring retesting in terms of regulation 1.12.
[29] See Masetlha v The President of the RSA and Another 2008(1) SA 566 CC [81]
[30] The objects of the South African Civil Aviation Authority as set out in section 3 of the SACAA Act.

may exercise no power and perform no function beyond that conferred upon them by law"[31]. Where the CAA acts *ultra vires* its powers it breaches the principle of legality. In the present instance the CAA exceeded its powers and its purported 'revocation' of the applicants rating is accordingly invalid. The appeal decision compounded the error and did not bring the CAA within the principle of legality.

PAJA and the meeting notifying of revocation and the appeal

28. There is no dispute that the provisions of the Promotion of Administrative Justice Act, 3 of 2000, apply to the administrative action taken against the applicant both in December 2005 and February 2006/7.

29. The respondent has not disputed that the applicants livelihood was affected by the action which took place at and on the day of the hearing on 13th December 2005 and as a result of the appeal decision of February 2006/07. Section 3 of PAJA requires that administrative action which "materially and adversely affecs the rights of any person must be procedurally fair".

30. It is not in dispute that no notice was given in advance of the nature and purpose of the meeting of 13th December 2005[32]. It is common cause that the applicant was not assisted at the meeting nor was he afforded legal representation[33]. It is common cause that the applicant was not provided with all documentation now to hand [34] – some of the documentation was not yet available at the time of the meeting of 13th December 2005– with the result that not all

[31] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999(1) SA 374 CC at para [58].
[32] See section 3(2)(b) of PAJA
[33] See section 3(3)(a) of PAJA
[34] Undated letter from Vere Webb to Safety Officer, Airquarius; completed form 'Instrument Rating Proficiency Test' undated and completed by V de V Webb; report/ letter from Airquarius Aviation to the CAA dated 24th December 2005;

documents could be presented, disputed or argued.[35]. The respondent did not dispute applicants averment that he was handed the letter 'revoking' his rating at the meeting of 13th December[36] and therefore does not dispute that the administration action of 'revocation' was determined upon prior to the meeting of that date and before any representations could be heard.

31. In the result that administrative action of 13th December 2005 was not in compliance with the provisions of section 3 of PAJA.

Conclusion

32. I have found that the CAA was not authorized to 'revoke' the applicants rating in terms of the Air Navigation Regulations. I have found that the action taken was procedurally unfair. I have found that the CAA's action was materially influenced by an error of law and fact with regard to the identity of the test carried out on 15th October. I have found that CAA was materially influenced by an error of law as to the appropriate action which may be taken by the CAA in certain defined circumstances. I have found that the appeal did not and could not remedy the situation and was, itself, unauthorized in terms of the Air Navigation Regulations.

33. Accordingly, the administrative action of 13th December 2005 and the appeal decision of February 2006/7 fall to be successfully reviewed in terms of the criteria set out in section 6 of PAJA.

Remedies available to the applicant

[35] See section 3(3)(b) of PAJA
[36] Founding affidavit para 14.2 and answering affidavit para 49.7.

34. The applicant has sought orders reviewing and setting aside the dismissal of his appeal against the revocation of his instrument rating on 13th December 2005; directing that his instrument rating and airline transport pilots license be reinstated; directing that all time periods available to the applicant for renewal of privileges and ratings attached to his license be reinstated and calculated from the date of this order.

35. For the reasons which I have already given, I do find that the revocation of the rating and the dismissal of the appeal against such purported revocation is invalid administrative action which must be set aside. It has not been suggested that, at this stage, there would be any purpose in remitting the matter for reconsideration by the CAA. Too much time has elapsed. Even if procedures in compliance with PAJA were followed and even if the CAA did not misdirect itself on the facts or the law, any action which it might have been entitled to take in 2005 in respect of a failure to maintain minimum standards or in the public interest have long since ceased to be timely or appropriate.

36. By reason of this delay and by reason of the sanction which has been incorrectly visited on the applicant for a period of almost three years, I consider this to be an exceptional case[37] where the court itself should both correct the defect resulting from the administrative action and order that the CAA should pay the costs of such correction. It must be noted that I have not expressed any view in respect of compensation.

37. Effectively, this amount to seeking an order that the applicants instrument rating be restored to him for the duration of the period from the date when the CAA purported to revoke it to the date when it would have expired, ie from 13th December 2005 to 22nd March 2006.

[37] Section 8(1)©(ii) of PAJA.

38. I have already indicated that I am not prepared to make such order. The only knowledge I have of the applicants capabilities on aircraft is the result of the in-house flight test of 14th October 2005 which had unsatisfactory results. Even if the CAA had never taken any action against the applicant, his instrument rating would have and presumably did expire in March 2006. There is no evidence before me that the applicant has been retested and that it has been renewed. Since both parties have taken the view that withdrawal of the applicants instrument rating has impacted on his use of his license, it would appear that the applicant has not exercised these particular skills since December 2005. In short, the intervention of a period of nearly three years since 'revocation' of the rating suggests that the applicants skills may be rusty and rusty and that he does not have the current qualifications or capability to hold the instrument rating of which he was previously possessed.

39. I have been asked to note that the CAA could not and did not revoke or withdraw the applicants license. There were conflicting arguments on this point[38] but I have not been left any the wiser as to whether or not the applicants airline transport pilots license (number 02701643 issued to him in 1973) remains valid, has been in use. I do note that the definition of 'rating' in the Regulations clearly distinguishes between the two and expressly states that the license can exist independently of the rating. The Regulations as a whole are to the same effect.

40. The CAA had other administrative action available to it when it was confronted with, what it felt to be, a failure on the part of the applicant to meet acceptable

[38]The applicant contends that the in house proficiency test did not affect the validity of his license (para 29 of the founding affidavit) which contention is denied by the respondent (para 61 of the answering affidavit).

standards. It exceeded its powers and took excessive action. When confronted with its errors, it failed to rectify the situation. It dismissed the applicants appeal. Court action was necessitated to finalise this stage of the process. I have no doubt that the applicant has sustained considerable hardship over these years. I note that the CAA is entrusted with important responsibilities for the benefit of the common good and that it must treat the competencies of pilots as a vital aspect of the safety of civil aviation. That does not excuse the CAA in its attitude or its actions.

41. As a result of the actions of the CAA the applicant will have to incur costs in obtaining his instrument rating. He may have to incur costs in respect of his license. As a mark of displeasure as regards the action and attitude of the CAA, I propose to order that the CAA must meet all costs of applicant obtaining issue, reissue, renewal the instrument rating[39] (including costs of test flights and the examination fees) as well as all costs of obtaining issue, reissue, renewal or validation of his license should this prove necessary. Such costs/expenses must be met within ten days of demand and production of proof of the costs to be incurred. Payment may be made directly to the provider of any service.

Orders

42. In the result orders are made as follows:

    a. The action of the CAA on 13th December 2005 and the decision of the CAA to dismiss the appeal against the aforesaid action is reviewed and set aside.

    b. The applicant is not reinstated in his instrument rating but is required to comply with the relevant provisions of the Air Navigation Regulations to obtain such instrument rating. The respondent is ordered to make payment, within ten days of demand and presentation of proof of the

[39] See inter alia regulation 1.11.

amount of the cost incurred or to be incurred, of all costs of such retesting and obtaining the instrument rating.

c. It is noted that the action of the CAA purported to be in respect of the applicants instrument rating and that no action was taken in respect of the applicants airline transport pilots license.
d. In the event that the applicant is obliged to incur any costs to obtain the issue or reissue, renewal or validation of such license, the respondent is ordered to make payment, within ten days of demand and presentation of proof of the amount of the cost incurred or to be incurred, of all costs of reinstatement or obtaining such license.
e. The respondent is to pay to the applicants cots of this application.

DATED AT PRETORIA 29th August 2008

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K. SATCHWELL

Hearing: 15 August 2008

Applicant's Counsel:
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