

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

Case Number: **2022-018947**

In the matter between:

CLOETE MURRAY N.O	First Applicant
--------------------------	-----------------

KGASHANE CHRISTOPHER MONYELA N.O	Second Applicant
---	------------------

AHMED CARIM N.O	Third Applicant
------------------------	-----------------

TRACY ANNE CAMERON N.O	Fourth Applicant
-------------------------------	------------------

BUHLE JEFFREY ERIC BUTHELEZI N.O	Fifth Applicant
---	-----------------

*[In their capacities as the Joint Provisional Liquidators
of Comair Limited (In Provisional Liquidation)]*

and

MUSA NSIBANDE N.O.	First Respondent
---------------------------	------------------

RAESIBE KEKANA N.O	Second Respondent
---------------------------	-------------------

LEANDA-MARSHA MTSHALI N.O	Third Respondent
----------------------------------	------------------

RICKIE RENNIE N.O	Forth Respondent
--------------------------	------------------

EMMANUEL MBUWE N.O	Fifth Respondent
---------------------------	------------------

PATRICIA MANTSINA N.O	Sixth Respondent
------------------------------	------------------

ANDRIES NTJANE N.O	Seventh Respondent
---------------------------	--------------------

THE AIR SERVICES LICENSING COUNCIL	Eighth Respondent
---	-------------------

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] This is an appeal in terms of section 25 of the Air Service Licensing Act 115 of 1990 (“the Act”), for the review and setting aside of the decision by the Air Licensing Service Council to suspend certain of Comair Limited’s operating licenses.

Parties

- [2] The first to fifth applicants are the duly appointed joint provisional liquidators in the insolvent estate of Comair Limited (“Comair”).
- [3] The first respondent is the chairperson of the Air Service Licensing Council (“the Council”), the second respondent its vice chairperson, the third, fourth and fifth respondents are all members of the council, and the sixth respondent is the secretary of the council.
- [4] The seventh respondent is the Deputy-director: Licensing and Permits and the eight respondent is the council, a juristic person established in term of section 3 of the Act.

Facts

- [5] Subsequent to an unsuccessful attempt to rescue the business of Comair in terms of business rescue proceedings, the business rescue practitioners applied and obtained an order for the business rescue proceedings to be discontinued and for the provisional winding-up of Comair. The order was granted on 14 June 2022 with the return date on 26 July 2022. At the time of the lodging of the appeal the return date was further extended to 13 December 2022.
- [6] Shortly after his appointment as provisional liquidator and on 12 July 2022, the first applicant received correspondence from the Council, which *inter alia* stated the following:

- “2. *The Air Services Licensing Council (“Council”) held its ordinary council meeting on 24 June 2022 and at the said meeting resolved under Council Resolution No. 11/24/06/2022 that it suspects, on reasonable grounds, that Comair Limited (“Comair”) has failed to comply with section 20(1) of the Air Services Licensing Act No. 115 of 1990 (“the Act”), which warrants the suspension and/or cancellation of its existing licence(s).*
3. *To this end, please be kindly advised that council hereby extends an invitation to the duly appointed Liquidator(s) to appear before it in accordance with the provisions of section 16(3) read together with section 20(2) of the Act, for purposes of addressing representations to it regarding the suspicions referred to in paragraph 2 above.*
4. *In accordance with the provisions of section 24 of the Act, council wishes for the Liquidator(s) to address it on the status of the airline and further instructs that the following documents be provided to it in 7 (seven) fold, within 7 (seven) calendar days of receipt of this letter, and hand delivered to the office of the council Secretariate, for attention of Miss Patricia Mantsina: ...”*

[7] Seven documents are listed in the letter. The first applicant was informed that the meeting would take place on 3 August 2022.

[8] The first applicant provided the requested documentation and attended the meeting on 3 August 2022. The first applicant states that the meeting concluded on the basis that he had to provide certain further information and documentation to the Council.

Decision and applicant’s case

[9] Notwithstanding the first applicant’s firm undertaking to provide the aforesaid documents, the Council resolved on the same day the meeting was held to suspend Comair’s two air services licences.

[10] The reason for the decision to suspend the air licences is as follows:

....Council was advised that Comair on 14 June 2022 was placed under provisional liquidation and in a court order dated 26 July 2022, the return date was extended to 13 December 2022, all of which is in direct violation of the provisions of section 19(d) of the Act, thus warranting the immediate suspension of your air licences.”

- [11] Section 19(d) of the Act pertains to the conditions for the issuing of a licence and section 19(d) reads as follows:

“on condition that a licence shall lapse as the estate of the licensee is sequestrated or wound up, as the case may be.”

- [12] On 12 August 2022, the applicant’s attorneys responded to the correspondence received from the council and pointed out that Comair has only been provisionally wound-up. Furthermore, section 19(d) provides that the licence will lapse, which makes the decision to suspend the licences non-sensical.

- [13] The council was given until 18 August 2022 to withdraw the suspension of Comair’s licences.

- [14] In response to the aforesaid demand, the council did not deal with the section 19(d) issue. Instead, the council appeared to rely on different grounds for the suspension of the licences, to wit:

“6. Upon your client concluding its representations to Council, which proceedings were held on 3 August, coupled with Council’s assessment of the documentation provided to it, Council ascertained gross non-compliance with the Act, the Domestic Regulations 1991 and in respect of Licence Conditions, all of which warranted the suspension of the licences concerned and the said suspension was duly communicated to your client.”

- [15] The applicants pointed out that the council failed to provide any details in respect of the alleged *“gross non-compliance with the Act, the Domestic Regulations 1991 and in respect of Licence Conditions,”*. On 22 August 2022 the attorneys for the applicants responded as follows:

“2. The reasons provided in your letter under reply for the suspension of the licence numbers...., differ to those provided in your previous correspondence. This is unlawful and impermissible.”

- [16] In view of the council’s conduct, the applicants lodged this appeal in terms of section 25 of the Act. Section 25(1)(b) provides that a person aggrieved with a decision of council in terms of rule 20(1)(b) or (c) may, in the prescribed manner, appeal against such a decision to the Provincial or Local Division of the High Court within the area of jurisdiction in which such person is resident.

Council’s answer and applicants’ response

- [17] In response to the application, the applicant, firstly, raised the point that the applicants have failed to comply with Regulation 24A of the Domestic Air Service Regulations, GNR 218 of 30 August 1991, published in Government Gazette No. 13507. The regulation reads as follows:

“24a An appeal contemplated in section 25(1) of the Act shall be noted and prosecuted as if it were an appeal against a judgment of a magistrate’s court in civil proceedings.”

- [18] According to the council the appeal should have been prosecuted in terms of the provisions of the Magistrates’ Court Act, 32 of 1944 and the rules thereto. I pause to mention that the applicants filed a notice of appeal in this court. The applicants pointed out that the appeal is a statutory appeal and that the Magistrates’ Court Act and rules are not applicable.
- [19] Secondly, the council for the first time, alleged that Comair does not have a valid operating certificate issued under the Civil Aviation Act, No 74 of 1962 (“CAA”) and as such does not comply with section 19(b). Section 19(b) provides that a licence is issued on condition that the licensee is in possession of a valid operating certificate. Thus, the council’s decision to suspend the licence has no bearing on Comair’s inability to operate. In response Comair attached its valid operating certificate to its replying affidavit.
- [20] A further new reason for the suspension is Comair’s alleged failed to amend its controlling shareholding and the particulars of the prescribed personnel

appointed by Comair to be responsible and accountable for the safety and reliability of the air service as prescribed by section 14(2) of the Act. The applicants pointed out that the shareholding composition of Comair has not changed and that a request had been forwarded to the council on 4 August 2022 to seek approval for the change of personnel in compliance with section 14(2).

Submissions and discussion

Non-compliance with regulation 24A

- [21] The applicants submitted that it would be impossible to follow the Magistrates' court rules in noting the appeal. There is for instance, no court file in the Magistrates' court in which Comair could file a notice of appeal as required by rule 51(4).
- [22] In fact and save for the timeframes contained in rule 51, none of the provisions in rule 51 could on any possible construction be applicable to an appeal noted in terms of section 25 of the Act. I invited counsel for the Council to explain the procedure that should, according to the Council, be followed in the Magistrates' court. Counsel had, understandably, great difficulty in suggesting a workable solution.
- [23] Section 25 of the Act makes it clear that an aggrieved party "*may appeal against such refusal or decision to the provincial or local division of the Supreme Court of South Africa*". The High Court of South Africa (previous known as the Supreme Court of South Africa) is, therefore, the forum in which the appeal must be heard. In order to indicate which procedure must be followed in the High Court, regulation 24A, states that the appeal will be heard as if it is an appeal against a judgment from the Magistrates' court.
- [24] Thus rule 50 of the Uniform rules of court that regulates "***Civil appeals from the magistrates' courts***" is applicable. The Council did not contend that the applicants failed to comply with the provisions of rule 50 of the Uniform Rules of court and I am satisfied that the appeal has been properly prosecuted.

Reasons for decision

- [24] It appears from the correspondence from the council dated 18 August 2022 and from the answering affidavit that the council no longer relies on the

provisions of section 19(d) of the Act as a reason for its decision to suspend Comair's licences.

- [25] The council's reliance on section 14(2) of the Act is misconceived. The fact that Comair was in business rescue and is presently provisionally liquidated did not change its shareholding. Both business rescue proceedings and liquidation proceedings are statutory created methods to manage the affairs of a company in financial distress by either rescuing the company or by winding it up.
- [26] Approval for the amendment of prescribed personnel was, at the time the answering affidavit was filed, pending. This entails that section 14(2) has been complied with.
- [27] Comair has provided proof of its operating certificate issued under the Civil Aviation Act, No 74 of 1962. As such section 19(b) of the Act is not applicable.
- [28] I pause to mention that Mr Notshe SC, counsel for the council, submitted in his heads of argument that the certificate is, for various reasons, not valid. These reasons were not dealt with in the papers and the applicants had consequently not had an opportunity to respond thereto. In the result, these further reasons are inadmissible.
- [29] In the premises, none of the reasons relied upon by the council for its decision to suspend Comair's licences have any merit and stands to be dismissed.

Costs

- [30] The applicants requested a cost order against all the respondents, jointly and severally, the one paying the other to be absolved. The appeal has been lodged against the decision of the council ("eight respondent) and, in my view, the council should be liable for the costs.
- [31] In the heads of argument filed on behalf of the applicants, the applicants requested costs of two counsel. I am satisfied that the matter justifies the employment of two counsel and such order will follow.

ORDER

The following order is issued:

1. The appeal is upheld and the decision of the eight respondent to suspend the licences with numbers: NO67D and SO66D of Comair Limited (in provisional liquidation) dated 3 August 2022 is set aside.
2. The eight respondent is ordered to pay the costs of the application, including the cost of two counsel.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:

23 February 2023

DATE DELIVERED:

21 April 2023

APPEARANCES

For the Applicants:

Advocate D Fine SC

Advocate A Milovanovic – Bitter

Instructed by:

Werksmans Attorneys

For the Respondents:

Advocate V Notshe SC

Advocate A Rakhutla

Instructed by:

The State Attorney