

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

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DATE

SIGNATURE

CASE NO: **22/20741**

In the matter between:

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

Applicant

AIRLINES ASSOCIATION OF SOUTHERN AFRICA

2nd Applicant

**BOARD OF AIRLINE REPRESENTATIVES OF
SOUTH AFRICA**

3rd Applicant

And

**AIRPORTS COMPANY SOUTH AFRICA SOC
LIMITED**

1st Respondent

MINISTER OF TRANSPORT

2nd Respondent

MINISTER OF FINANCE

3rd Respondent

SOUTH AFRICAN CIVIL AVIATION AUTHORITY	4 th Respondent
AIR BOTSWANA (PTY) LTD	5 th Respondent
AIR FRANCE –KLM	6 th Respondent
AIR PEACE	7 th Respondent
AIR SEYCHELLES LTD	8 th Respondent
AIR ZIMBABWE (PRIVATE) LIMITED	9 th Respondent
BRITISH AIRWAYS PLC	10 th Respondent
CEMAIR LIMITED	11 th Respondent
CONGO AIRWAYS S.A	12 th Respondent
COMAIR LIMITED T/A BRITISH AIRWAYS AND KULULA	13 th Respondent
CONDOR FLUGDIENST	14 th Respondent
EDELWEISS AIR AG	15 th Respondent
EGYPT AIR	16 th Respondent
EMIRATES	17 th Respondent
ETHIOPIAN AIRLINES GROUP T/A ETHIOPIAN AIRLINES	18 th Respondent
ETIHAD AIRWAYS	19 th Respondent
FLYSAFAIR	20 th Respondent
GLOBAL AVIATION OPERATIONS (PTY) LTD T/A GLOBAL AIRWAYS AND LIFT	21 st Respondent
KENYA AIRWAYS PLT	22 nd Respondent
LINHAS AREAS DE MOCABIQUE SAR T/A LQM	23 rd Respondent

LUFTHANSA AIRPLUS SERVICEKARTEN GMBH T/A LUFTHANSA	24 th Respondent
PRECISION AIR SERVICES LIMITED T/A PROFLIGHT ZAMBIA	25 th Respondent
QANTAS	26 th Respondent
QATAR AIRWAYS GROUP T/A QATAR AIRWAYS	27 th Respondent
SWISS INTERNATIONAL AIR LINES AG T/A SWISS	28 th Respondent
TAAG ANGOLA AIR LINES E.P T/A TAAG	29 th Respondent
TURKISH AIRLINES	30 th Respondent
UNITED AIRLINES INC	31 st Respondent

Coram: Dlamini J

Date of Request for Reasons: 22 May 2023

Date of delivery for Reasons: 10 July 2023

JUDGMENT

DLAMINI J

[1] On 23 May 2023, I made a draft order marked “X” an order of this Court. Below are my reasons for that order.

[2] This is an application in terms of Rule 30A of the Uniform Rules of Court.

[3] The common cause facts are as follows, on 14 June 2022 the applicants launched a review application in terms of Rule 53 of the Uniform Rules of Court seeking the following relief;-

3.1 Declaring that the decision of the first respondent, communicated by the first respondent to the first applicant by a letter on or about 17 December 2022, refusing to agree to the first applicant's planned replacement of aging Hold Baggage Screening ("HBS") equipment ("the refusal decision") is unlawful, reviewed and set aside.

3.2 If applicable, declaring that the decision of the first respondent to procure HBS equipment itself and conduct a competitive process for the appointment of a third party to conduct HBS services at the first respondent's airports ("the termination decision") is unlawful, reviewed, and set aside.

[4] On 21 July 2022, the first respondent filed the record. Not satisfied with the filed record, the applicants launched this application in terms of Rule 30A compelling the first respondent to file a complete record.

[5] The main bone of contentions relates to the contents, status, and interpretation of the first respondent's letter dated 17 December 2021, written by the first respondent's attorneys to the first applicant's attorneys.

[6] It is contended by the first applicant that the 17 December 2021 letter constitutes the refusal decision. The first applicant avers that the termination insourcing decision and the termination decision are for all intent purposes similar. In that with the insourcing decision, the first respondent has determined to insource the provision of HBS and with the termination decision it has determined that ACSA is responsible for the provision of HBS services and a result cannot allow ACS to continue providing HBS services, unless the first respondent has appointed ACS through a procurement process that is

conducted in terms of section 217 of the Constitution to provide HBS services on ACSA's airports.

- [7] In the results, the first applicant insist that they are entitled to all the documents that relate to both the refusal and termination decisions.
- [8] In its reply, the first respondent denies that the 17 December 2021 letter constituted a refusal decision by ACSA. The first respondent contends that it has not taken any decision cable of judicial review concerning the management and operation of HBS at its airport. The first respondent insists that the applicants are aware that no termination decision exists, in that no termination notice was given to the applicants from rendering the service of HBS. Further, that after the letter dated 17 December 2023 to date, the applicants continue to operate the HBS services at all ACSA airports.
- [9] In my view, ACSA's submission that the letter of 17 December 2021 was simply a reply to the first applicant demand that ACSA should confirm or support the first applicant's application to SACAA for the replacement of the HBS system at ACSA's airport has merit.
- [10] The submission by the first applicant that ACSA has taken what the first applicant refer to as the termination decision is concerned is meritless and must be dismissed. This is so because as at the launch, up to the hearing of this application, the first applicant continue to provide HBS services at all ACSA's airports. It was only during the hearing of this application that Counsel for the first respondent advised this Court that the ACSA's Board had on 18 May 2023 taken a decision that related to the provision of HBS services at its airports. In part the resolution reads as follows; "*1, The insourcing of Hold Bagge Screening Service be and is hereby approved subject to approval by the Minister in accordance with section 54(e) of the Public Finance Management Act, as amended*".

[11] On a businesslike and sensible interpretation, it is clear that it is only the above-mentioned ACSA's Board decision of 18 May 2023, that has the effect of a 'refusal' and 'terminating' of the first applicant's provision of the HBS services at ACSA's airports and not the 17 December 2021 letter.

[12] It should therefore follow that this Court cannot grant an order compelling ACSA to produce records of a non-existent decision.

[13] In all the circumstances alluded to above, the first applicant have failed to discharge the *onus* that rested on their shoulders to justify the order that they seek.

ORDER

1. The draft order marked "X" that I signed on 22 May 2023 is made an Order of this Court.

DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of Request for Reasons: 22 May 2023

Date Delivered: 10 July 2023

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