THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 13/2016

In the matter between:

MINISTER OF HOME AFFAIRS	**FIRST APPELLANT**
DIRECTOR-GENERAL OF HOME AFFAIRS	**SECOND APPELLANT**
and	
FIREBLADE AVIATION PROPRIETARY LIMITED	**FIRST RESPONDENT**
SOUTH AFRICAN REVENUE SERVICE	**SECOND RESPONDENT**
DENEL SOC LIMITED	**THIRD RESPONDENT**

Neutral citation: *Minister of Home Affairs & another v Fireblade Aviation Ltd &* others (13/2016) [2018] ZASCA 46 (28 March 2018)

Coram: **Wallis JA and Hughes AJA**

Heard: No hearing.

Delivered: 28 March 2018

Summary: Application for leave to appeal against judgment in High Court in application proceedings – such to be dealt with under s 16(1)*(a)*(i) of the Superior Courts Act 10 of

2013 (the Act)– the fact that the High Court had granted an enforcement order in terms of s 18(1) of the Act and that order has been upheld by the Full Court in an appeal under s 18(4) does not make the application one for special leave to appeal in terms of s 16(1)*(b)* of the Act – no reasonable prospects of success on appeal – application for leave to appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill J sitting as court of first instance:

Leave to appeal is refused with costs.

JUDGMENT

WALLIS JA (Hughes AJA concurring)

[1] When this application for leave to appeal was placed before us in terms of ss 17(2)*(b)* and *(c)* of the Superior Courts Act 10 of 2013 (the Act) the parties were at one in saying that it was an application for special leave to appeal in terms of s 16(1)*(b)* of the Act. We queried that by way of a letter addressed by the registrar to the parties' attorneys. In reply, the attorney for the applicants accepted that it was in fact an application for leave to appeal in terms of s 16(1)*(a)*(i) of the Act. The attorneys for the first respondent (Fireblade) persisted in submitting that it was an application for special leave to appeal, or alternatively was one that was closely akin to an application for special leave. They contended that this latter meant that it is relevant to the determination of the application that two courts have carefully considered and dismissed the merits of the matter. Hence the need for this short judgment.

[2] Fireblade brought application proceedings before the Gauteng Division of the High Court, Pretoria, seeking an order that the First Applicant, the Minister of Home Affairs (the Minister), had granted its application for approval of an ad hoc international customs and immigration component of a corporate fixed base aviation operation to be conducted by officials of the Border Control Operational Co-ordinating Committee at premises it had established within the precincts of O R Tambo International Airport.

Despite the opposition of the Minister the application succeeded before Potterill J and an order was granted on 27 October 2017.

[3] An application for leave to appeal was heard on 1 December 2017 and dismissed on 8 December 2017. On the same day Potterill J granted an order in terms of s 18(1) of the Act that the operation of her earlier order was not suspended pending the determination of the application for leave to appeal 'as well as any subsequent applications for leave to appeal that may be delivered by any of the other respondents as well as any other appeal'. This order was the subject of an urgent appeal to the full court in terms of s 18(4) of the Act. That appeal was dismissed on 14 December 2017.

[4] The reason the parties thought that this application for leave to appeal against Potterill J's original judgment was an application for special leave to appeal was the following. Potterill J had dealt with the merits of the case initially and also when refusing leave to appeal and granting the enforcement order. Her reasoning was scrutinised and endorsed by the full court when hearing the s 18(4) appeal. Accordingly, so the parties reasoned, and the respondent continues to reason, two courts have considered the merits and an appeal to this court is therefore one that requires special leave to appeal.

[5] If incorrect this needed to be corrected because it affects the test to be applied by this Court in determining the application for leave to appeal. It is incorrect because the application before us is not an application to appeal against the decision of the full court, but an application to appeal against the original judgment of Potterill J. As such it is an application for leave to appeal against a decision of a single judge and falls under s 16(1)*(a)*(i) of the Act. The test to be applied in terms of s 17(1) of the Act is therefore whether the appeal would have reasonable prospects of success or whether there is some other compelling reason why an appeal should be heard.

[6] We are satisfied that neither of these tests is satisfied in this case. Potterill J's grant of an order in favour of Fireblade was based upon two documents in which it was recorded clearly and contemporaneously that on 28 January 2016 the Minister had

granted the approval sought and signed a letter to that effect to be forwarded to Fireblade. The accuracy of these documents, one of which was a letter addressed personally to the Minister, was not challenged at the time. Instead, when the third respondent raised an issue, the Minister in his own handwriting noted that Fireblade be informed that 'the approval we granted them is also suspended'. The underlining was his. His subsequent attempts to explain that he had not granted Fireblade the approval it sought, but merely indicated that 'the major stakeholders have indicated that the project can go ahead' were inconsistent with these documents and we cannot fault the judge's rejection of them, subsequently endorsed by the full court.[1]

[7] The other grounds advanced in support of the application for leave to appeal can be disposed of shortly. The first was a contention that Fireblade applied for the designation of its facility as a port of entry. That was rightly rejected on the basis of the Minister's own letter saying that the application did not involve the declaration of the facility as a new port of entry. That was followed by a letter from Fireblade correcting the nature of its application to one for ad hoc facilities within an existing port of entry viz O R Tambo International Airport.

[8] The second additional ground in support of the application was a contention that a decision by the Minister on 27 October 2017 to reject Fireblade's application stood until it had been set aside. Here the Minister is hoist by his own petard. The rejection of his version of the events on 28 January 2016 led inexorably to the conclusion that Fireblade's application had been approved. He was therefore bound by that decision unless and until a court set it aside and yet he brought no application to set it aside.[2] It therefore stood and was affirmed by the judgment of the high court. As the high court pointed out in its judgment this rendered redundant the precautionary application by the

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[1] See *Da Mata v Otto* 1972 (3) SA 858 (A) and *Platinum Holdings (Pty) Ltd v Victoria and Alfred Waterfront (Pty) Ltd* (2004) 8 CLR 231 (SCA) paras 14 and 15 for cases in which the inability to provide any convincing explanation of contemporaneous documents led the court to reject evidence as untenable without the need for oral evidence.

[2] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) paras 101-103; *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC) paras 141-150.

first respondent to review and set aside that decision. The Minister cannot rely on his own unlawful attempt to circumvent the decision he had lawfully made to grant Fireblade's application.

[9] The last contention in support of the application was that in granting the application the Minister acted contrary to s 217 of the Constitution dealing with the procurement by an organ of state of goods and services. But the grant of the application did not involve an organ of state in procuring goods or services from Fireblade. It was itself discharging its own statutory functions in regard to immigration control and customs at an existing port of entry, to wit, O R Tambo International Airport. The fact that for a provisional period Fireblade was to bear the cost of its doing so cannot alter that fact.

[10] One further point that the applicants raise was the failure of the high court to deal with a counter-application seeking declaratory relief in relation to the proper interpretation of s 9A of the Immigration Act 13 of 2002 in respect of the Minister's powers to designate a place as a port of entry. This was clearly related to the issue dealt with in para 7 of this judgment and for the reasons set out there this was not an issue in dispute between the parties. It was accordingly not apt for determination in proceedings between Fireblade and the Minister. In any event we do not think the arguments put forward have any reasonable prospects of success.

[11] We are accordingly of the opinion that an appeal against Potterill J's judgment has no reasonable prospect of success. There is nothing to suggest that the issues raised by the Minister are of such a nature as to warrant the grant of leave to appeal notwithstanding the lack of prospects of success.

[12] The application for leave to appeal is dismissed with costs.

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M J D WALLIS

JUDGE OF APPEAL

Appearances:

Applicants: State Attorney,
Pretoria and Bloemfontein

First Respondents: Werksmans Attorneys, Johannesburg;
Symington & De Kok, Bloemfontein.