

CIVIL APPEAL NO. 2/89

IN THE COURT OF APPEAL OF SWAZILAND HELD AT MBABANE

THE MINISTER FOR WORKS AND COMMUNICATIONS Appellant

and

SWAZI AIR CHARTER LIMITED Respondent

Coram: WELSH, J.A.
SCHREINER, J.A.
LEON, J.A.

For appellant: Mr J. M. Dlamini
For respondent: Mr E. Zar

Date of hearing: 10th October, 1989.
Date of Judgment: 11th October, 1989.

JUDGMENT
WELSH, J.A.

On 11th October, 1989, this Court made the following order in relation to this appeal:-

1. The appeal is struck off the Roll.
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2. The appeal may not be reinstated without leave of this Court on good cause shown.
3. The appellant is ordered to pay the costs of the respondent.

The matter had been heard on 10th October, 1989; and in the course of the judgment which I delivered on 11th October, 1989, I indicated briefly the reasons for the making of that order. I delivered that judgment orally in open Court; and it should have been accurately recorded and transcribed. This, unfortunately, did not occur. I do not know whether the mishap occurred in the process of electronic recording or in the process of transcription; but the transcript which was presented to me for "revision" was so defective as to be incapable of revision in any ordinary sense. It is not the function of members of this Court to re-write inadequate transcripts of judgments which are orally delivered in open Court; and the course which I propose to take in this matter should not be regarded as a precedent. The Registrar has informed me that the parties are anxious to have an authentic written record of the Court's reasons for the order which was made on 11th October, 1989; and having consulted the Judge President, I am prepared to re-state those reasons.

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On 22nd September, 1988, the Air Transport Licensing Authority (which was the second respondent in the Court below) granted to Swazi Air Charter Limited (the respondent in this appeal) a licence to operate a non-scheduled air service for the transport of passengers from Swaziland to Saudi Arabia and India. This licence was expressed to be valid from 22nd September, 1988, to 21st September, 1989.

Two months after the grant of this licence, on 23rd November, 1988, the Air Transport Licensing Authority, on the instructions or directions of the Minister for Works and Communications (who was the first respondent in the Court below and is the present appellant), purported to revoke the licence.

On 25th November, 1988, the present respondent made an urgent application to the High Court, citing

the Minister as the first respondent, the Air Transport Licensing Authority as the second respondent and the Attorney-General as the third respondent, for a rule nisi calling upon them to show cause why the revocation of the licence by the Air Transport Licensing Authority should not be set aside, why the "directive" issued by the Minister to the Air Transport Licensing Authority should not be set aside, why the order issued by the Air Transport Licensing Authority to the applicant to surrender its licence should not be set aside, and why the proceedings of the Air Transport

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Licensing Authority should not be reviewed and corrected or set aside. The applicant also sought an order directing all the respondents jointly and severally to pay the costs. The rule nisi was granted. The Minister filed an answering affidavit dated 30th November, 1988. The applicant filed a replying affidavit dated 1st December, 1988. The matter came before the learned Chief Justice on 6th December, 1988. On that day, he delivered a judgment which was substantially in favour of the applicant. He set aside the revocation of the applicant's licence by the Air Transport Licensing Authority and also the order of that Authority requiring the applicant to surrender its licence and also, in effect, the proceedings of that Authority. He did not confirm that part of the rule nisi which called upon the respondents to show cause why the "directive" issued by the Minister to the Air Transport Licensing Authority should not be set aside: on the contrary, he said that "I do not ... consider that a case has been made out to warrant the setting aside of the direction given by the Minister". He ordered the Air Transport Licensing Authority (not the Minister) to pay the costs of the application.

There is one further matter which should be mentioned in connection with the proceedings in the Court below. The Minister contended, in his answering affidavit, that the applicant's licence had been invalidly granted, because the applicant "has its registered office as the offices

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"of Attorneys with which the Chairman of the 2nd Respondent is professionally associated" and the Chairman of the second respondent, who presided over the proceedings of the application for the grant of the applicant's licence, "is a business associate of the counsel who represented the Applicant in the proceedings of the application for the licence". The learned Chief Justice heard argument on this question and said in his judgment that he could "find no merit in" the Minister's contentions.

Against this judgment, only the Minister appealed. The Air Transport Licensing Authority did not appeal, even though the Court below had made an order for costs against it and not against the Minister. The Minister's appeal was set down for hearing during the first session of this Court which commenced on 28th March, 1989. The Minister's Heads of Argument were filed and served on 20th March, 1989. That was not in accordance with the Rules of this Court, and as a result the parties agreed that the appeal should be postponed. We were informed from the Bar that there was some discussion between the parties as to whether a special session of this Court should be arranged to hear this appeal, since it was known that the next ordinary session of this Court would be in October.

Reference was made by counsel for the respondent in this appeal to certain correspondence which appears to indicate that the parties agreed to an early appeal by the Minister if the Minister

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was prepared to meet the cost of convening a special session of this Court. In the result, however, no request was made for a special session of this Court and the appeal was set down for hearing on 10th October, 1989.

By that time, the expiry date of the licence (21st September, 1989) had passed. The question therefore arose whether any good practical purpose could be served by this Court hearing argument as to whether the grant of the licence on 22nd September, 1988, was valid and, if so, whether the purported revocation of the licence on 23rd November, 1988, was valid. There was not even any question of costs which might be used as a peg on which to try to hang an argument on the merits of

the appeal, since the Court below had made no order for costs against the Minister. Counsel for the Minister suggested that an application might be made for leave to join the Air Transport Licensing Authority (against which the Court below did make an order for costs) as a party to this appeal. All I need say about that at this stage is that it is unlikely that this Court would grant leave to a party, who has not noted an appeal, to appeal late merely on a question of costs. Then there was some talk about the possibility that the present respondent might bring an action for damages against the Minister or the Air Transport Licensing Authority or some other State authority, in which event the validity of the grant of the licence and of its

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purported revocation might be in issue. As far as the Minister is concerned, the Court below did not confirm that part of the rule nisi in which it was sought to set aside the direction given by him to the Air Transport Licensing Authority: and the other possibilities mentioned seem to be somewhat remote, especially in view of the short time which elapsed between the purported revocation of the licence and the granting and confirmation of the rule nisi by the Court below. I do not, however, propose to say anything more about this aspect of the matter, except that it was because these possibilities had been mentioned that we did not dismiss the appeal but merely ordered that it be struck off the Roll, with costs, and that it may not be reinstated without the leave of this Court on good cause shown.

SCHREINER, J.A.: I agree

LEON, J.A.: I agree