IN THE SUPREME COURT OF SWAZILAND

CASE NO.47/06

In the matter between:

SWAZI EXPRESS AIRWAYS (PTY) LTD
APPELLANT

AND

MINISTER OF FOREIGN AFFAIRS & TRADE **1st RESPONDENT**

GOVERNMENT OF SWAZILAND **2nd RESPONDENT**

MINISTER OF PUBLIC WORKS AND TRANSPORT **3rd RESPONDENT**

PRINCIPAL SECRETARY, MINISTRY OF

PUBLIC WORKS & TRANSPORT **4th RESPONDENT**

DIRECTOR, CIVIL AVIATION **5th RESPONDENT**

CHAIRPERSON OF AIR TRANSPORT

LICENSING AUTHORITY 6th RESPONDENT

AIRLINK SWAZILAND LTD 7th RESPONDENT

ATTORNEY GENERAL 8th RESPONDENT

CORAM: TEBBUTT JA

ZIETSMAN JA

RAMODIBEDI JA

FOR THE APPELLANT ADV. P. KENNEDY SC

FOR 7™ RESPONDENT ADV. P. DANIELS

JUDGMENT

TebbuttTA

[1] The subject matter giving rise to this appeal is the air passenger service between Swaziland and Johannesburg in South

Africa.

[2] The seventh respondent, Airlink Swaziland Limited, to which I shall for convenience refer hereinafter as Airlink Swaziland, currently operates daily scheduled air transportation services for passengers between Matsapa International Airport at Manzini in Swaziland and the OR. Tambo International Airport in Johannesburg. It is the only airline which does so and therefore has a ***de facto*** monopoly in respect of those services.

[3] The shareholders in Airlink Swaziland are the second respondent in this appeal, the Government of Swaziland, (hereinafter for convenience referred to as "the Government") and a company known as S.A. Airlink (Proprietary) Limited (hereinafter referred to as "S.A. Airlink"), the Government currently holding the majority shareholding of 60%.

[4] The appellant, Swazi Express Airways (Pty) Ltd, to whom I shall continue throughout herein to refer as the appellant, currently operates air transportation services for passengers between Matsapa International Airport and other destinations outside Swaziland, in particular Durban in South Africa and destinations in Mozambique.

[5] Eager to expand its operations to also include air services for passengers between Swaziland, from Matsapa International

Airport, and OR Tambo International Airport in Johannesburg, the appellant applied under the Aviation Act No.31 of 1968 (the Act) and the Aviation Regulations thereto, to the Air Transport Licensing Authority, which is the body under the Act which deals with such applications, for a licence to operate the Swaziland - Johannesburg route.

[6] Objections to the granting of the licence were lodged by both Airlink Swaziland and the Principal Secretary of the Ministry of Public Works and Transport, the relevant Government Ministry charged with transport matters. These notwithstanding, however, the Licensing Authority decided on 17th January 2006 - to grant the appellant a licence for the Johannesburg - Swaziland route for a period of three years. It added a rider that the frequency of flights and the timetable had not been finalized as they were to be negotiated between the appellant and Airlink Swaziland.

(7) Regulation 269 of the Aviation Regulations provides that -

> **"Every party to a case before the licensing authority shall have a right of appeal to the Minister in accordance with the provisions of this regulation from the decision with respect to the grant… of an air transport licence."**

It is common cause that the Minister referred to in the said regulation is the Minister of Public Works and Transport

who is the third respondent in this appeal.

[8] On the 3rd February 2006 Airlink Swaziland *lodged* an appeal against the decision of the Licensing Authority to grant the appellant the licence in question.

[9] After a delay of almost six months from February to July 2006, the Minister in an affidavit dated 18th July 2006 conceded that, on legal advice from the Attorney General, he could not and should not hear and decide the appeal. This was because of the commercial interest viz its 60% shareholding in Airlink Swaziland, which wished to preserve its monopoly on the Swaziland - Johannesburg route and avoid competition which would occur if the appellant were permitted to operate its air services on that route in terms of the licence granted to it by the Licensing Authority. The Ministry of Public Works Transport is part of the Government. Moreover, the Principal Secretary in the Ministry had made public utterances that the Government, which was deeply involved in the airline operation through Airlink Swaziland, would not allow competition.

(10) Airlink Swaziland maintained that having noted an appeal it was not obliged to negotiate with the appellant the frequency of its flights or its timetable as required by the Licensing Authority and it refused to do so. This factor and the co-incident refusal of the Minister to entertain the appeal of Airlink Swaziland

prompted the appellant to launch in the High Court as a matter of urgency, by way of notice of motion, an application for the following relief

(I set it out in precis form):

Part A: pending the relief in Part B,

(a) directing the Minister of Foreign Affairs or the Government to designate the appellant as the second airline on the Swaziland - Johannesburg route; and

(b) directing Airlink Swaziland to share the frequencies over the said route so as to allow the appellant from Mondays to Sundays two flights per day, one morning one afternoon.

Part B: (i) An order declaring that the Minister is disqualified from hearing the aforesaid appeal; or alternatively

(ii) An order directing the Minister to make a decision on the said appeal within 90 days.

(iii) An order that the interim relief in Part A is made final if the prayer set out in Part B (i) is granted and that the relief granted in Part A continue to operate if the prayer in Part B (ii) is granted.

The application was opposed by Airlink Swaziland and by the Government, who were both cited as respondents.

(11) The matter came before Mamba AJ. The Minister, who was cited as a respondent, conceded that he was disqualified from hearing the appeal. Mamba AJ accordingly granted the relief claimed in Part B (i) above. The appellant did not insist on any of the prayers in Part A and therefore the learned Judge made no order on them or on the prayers in Part B (ii) and (iii) as set out above. He went on to make the following finding:

> **"This court has not, in this application, been called upon to determine or make a finding whether or not the right of the 7th respondent (i.e. Airlink Swaziland) to appeal against the order of the Licensing Authority has perished or ceased to exist by the mere disqualification of the 3rd respondent from hearing such appeal. The next or second and necessary leg of such an enquiry would of course be, if such right of appeal has not been extinguished by the said qualification, where does it lie? I shall therefore refrain from expressing a view on this issue as I believe it should be the subject of litigation between the parties herein in the future."**

The court a quo also ordered that each party should bear its own costs.

(12) The appellant appealed to this Court against the decision of the Court a quo and, in particular, that part of it that I have quoted in paragraph 11 above and the question of costs.

(13) In this Court the parties were ***ad idem*** that the Minister could not or should not hear and determine Airlink Swaziland's *appeal* to him. They were, however, not ***ad idem*** as to what flowed from that. The appellant contended that as the A4inister was the designated authority to hear the appeal and as he could not do so, the right to appeal contained in Regulation 269 ceased to exist and fell away and the granting of the licence to appellant by the Licensing Authority had therefore to be confirmed and given effect to. In the alternative, it submitted that if the Court found that the right to appeal did not cease to exist, the High Court should hear and decide the appeal. The respondents disputed that the right of appeal had ceased to exist and submitted that the Court should appoint an independent arbitrator to decide the appeal.

[14] When the matter came before this Court for hearing the parties, at the suggestion of the Court, arrived at an agreement that the appeal against the granting to the appellant of its licence by the Licensing Authority should be heard and decided and that this should be done by an independent tribunal. A draft order, agreed to by the appellant and by Airlink Swaziland, was furnished to the Court which was requested to make it an order of court. The Court will do so and it is incorporated in the court's order at the end of this judgment. All the other respondents, including the Government, were satisfied to abide by the

agreement.

[15] One aspect, however, was not agreed upon and was left over for resolution by this Court. It is this. In its application in the Court a quo the appellant cited as respondents not only Airlink Swaziland who was the seventh respondent, and the Government as the second respondent and the Minister of Public Works and Transport as the third respondent but also as first respondent the Minister of Foreign Affairs and Trade; as fourth respondent the Principal Secretary in the Ministry of Public Works and Transport; as fifth respondent the Director of Civil Aviation; as sixth respondent the Chairperson of the Licensing Authority; and as eighth respondent, the Attorney General.

(16) As set out above, the only orders on the application itself that Mamba AJ made was one declaring the Minister of Public Works and Transport disqualified from hearing Airlink Swaziland's appeal and one on costs. His orders read as follows:

> **"1.** the **3rd** respondent is declared, (as conceded **by** him) disqualified from hearing the appeal as prayed for in prayer **1** of Part **B** of the application. **1.1** the rest of the prayers **by** the applicant are dismissed.
> **2.** Each party is ordered to bear its own costs."

(17) Despite the appellant, in its notice of appeal, having noted an appeal against the costs order made by the Court a quo,

submitting that the Court should have ordered the respondents to pay its costs, it did not persist with this aspect of the appeal in this Court. Airlink Swaziland as the seventh respondent was content with this.

However, all the other respondents were not. Mr. Magagula, for the first to fifth and eighth respondents, contended that they were entitled, as against the appellant, to their costs both in the Court a quo and of the appeal in this Court. Sixth respondent was not represented as no relief had been sought against it by the appellant and falls out of the picture.

[18] In its grounds of appeal the appellant contended that as it had in the court a quo been substantially successful "all the respondents, save for the sixth respondent, had no basis for such opposition" and that accordingly the costs of the application in the lower court should be paid "by the first to fifth, the seventh and eight respondents jointly and severally." Because of this the Court allowed Mr. Magagula, who had come to oppose on behalf of the first to fifth and eight respondents the making of such an order, to make submissions to the Court even though no cross-appeal on the question of costs had been noted.

[19] The import of Mr. Magagula's submissions is that the appellant had asked that, pending the relief sought in Part B of the application, an interim interdict be granted directing the

first, or alternatively the second, respondent to designate the appellant the second airline on the Swaziland - Johannesburg route.

[20] First and second respondents are, as set out above, the Minister of Foreign Affairs and the Government. Part Bl was that the third respondent, the Minister of Public Works and Transport, be declared disqualified form hearing Airlink Swaziland's appeal and if such order were granted that the interim relief claimed in Part A be made final. It was those orders that the respondents had opposed. Apart from the one declaring the disqualification of the third respondent, the appellant did not persist in the rest of its claims in Part B or any of those in Part A. Mr. Magagula further submitted that the respondents had not opposed the disqualification of the third respondent but had conceded it. The effect of this, so submitted Mr. Magagula, was that the orders which the appellant had sought against it and which it had opposed had not been granted by the court a quo. This represented substantial success on the part of the respondents in the court a quo and the costs should therefore follow the result and be paid by the appellant. The respondents had been obliged to come to this Court to obtain this result and they should accordingly also get their costs on appeal.

(21) Mr. Kennedy for the appellant, however, submitted that the award of costs lay within the discretion of the court a quo and

that this Court would, on appeal, be slow to interfere with the lower court's exercise of its direction if there had been no misdirection by the court a quo. That, as a general proposition is, of course, correct, (see e.g. **PENNY V WALKER 1936 AD 241** at 260; **MERBER V MERBER 1948(1) SA 446 (A)** at 452). It has, however, been held in the South African courts that this discretion is not an unlimited one. In **FRIPP V GIBBON AND COMPANY 1913 AD 354,** Lord de Villiers CJ said at 357:

> **"In appeals upon questions of costs two general principles should be observed. The first is that the Court of first instance has a judicial discretion as to costs, and the second is that the successful party should,** as a general rule, have his costs. The discretion of such Court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that to the successful party should be awarded his costs."

This statement was approved in **MERBER V MERBER** supra (see also **LEVIN V FELT AND TWEEDS LTD 1951(2) SA 401 (A)** at 416D-E.)

(22) In the present case Mamba AJ in the exercise of his discretion found that it would be in the best interests of justice that each party be left to bear its own costs. In coming to this finding he said this in relation to the respondents represented in this appeal by Mr. Magagula.

> "Save for the **7th** respondent, the respondents are functionaries or departments of the **2nd** respondent. Apart from the **3rd** respondent (Minister) the Government officials or departments have been successful in this application insofar as no order has been made against them. However, an order for costs against the **3rd** respondent would, in effect be an order for costs against the **2nd** respondent, which as aforesaid, has been successful in some respects."

(23) No fault can be found with the reasoning of the learned Judge in the abovequoted paragraph. He was clearly correct in stating that the respondents, save for Airlink Swaziland, were all functionaries of the Government. They obviously are. I shall refer to this again later herein. He also recognized their success in having no order made against them on those aspects of the appellants' application that they opposed. He was, in my view, however also correct in finding that the appellant had been successful in obtaining an order against the third respondent, the Minister of Public Works and Transport.

(24) In regard to the latter finding, the factual situation was that after Airlink Swaziland had noted its appeal against the granting of the licence for the Swaziland - Johannesburg route to the appellant, the appellant, in what it has described as a "litany of correspondence," from 15th March 2006 to 1st June 2006, entreated the Minister to expedite his adjudication of the appeal but to no avail. It was not in such correspondence stated by or on behalf of the Minister that he was precluded from hearing the

appeal. Ultimately the appellant on 21st June 2006, in order to obtain resolution on the matter, brought its application seeking, as set out above, a declaratory order that the Minister was disqualified from hearing the appeal. It was only thereafter that the Government on 19th July *2006,* in an opposing affidavit on its behalf - in which it admitted the delay in the finalization of the appeal - stated that it had been advised that it was not proper for the Minister to hear the appeal. In a confirmatory affidavit dated 18th July 2006 the Minister said that he accepted that advice. The concession by the Minister only came after the appellants' application had been launched. The appellant was thus entitled to approach the court a quo for the declaratory order that was eventually granted. The finding of Mamba AJ that the appellant had achieved success in obtaining that order against the Minister was accordingly fully justified.

[25] Mr. Magagula, however, submitted that the order was not obtained against the Government. It had, he argued, been obtained against the Minister "in his capacity as the quasi-judicial officer charged with hearing and determining the appeal by law." There is no substance in this submission. The Minister referred to in Regulation 269 of the Aviation Regulations, made under the Aviation Act, is defined in that Act as "the Minister responsible for Aviation." That obviously is a Minister of State or of the Government and, moreover, Section 22 of the Act provides that "this Act shall bind the Government." The declaratory order

against the Minister was therefore clearly against the Government.

[26] Concluding that the appellant and the Government had each achieved a measure of success, Mamba AJ therefore exercised his discretion by ordering each party to bear its own costs. He bore in mind the general rule that a successful party should have its costs, which he found applied to both the appellant and the Government, and then exercised his discretion judicially in the way that he did. (cf. **LEVIN V FELT AND TWEEDS** supra at 416D). There is no basis upon which this Court can interfere with that exercise of discretion and the costs order of the Court a quo must accordingly stand undisturbed.

(27) It follows that the respondents which are represented by Mr. Magagula cannot get their costs on appeal. In the light of their agreement below, neither the appellant nor Airlink Swaziland sought costs before this Court. Accordingly, this Court will make no order as to costs.

In the result therefore the Court makes the following order:

1. The Consent Order hereto annexed marked "A" is made an Order of Court.

2. Save for what is contained in Paragraph **1**0 of the said Consent Order, there shall be no order as to costs.

P.H. TEBBUTT
Judge of Appeal

I AGREE

N.W. ZIETSMAN

Judge of Appeal

I AGREE

M.M. RAMODIBEDI
Judge of Appeal

Delivered in open court on this …16th. day of November 2006

IN THE COURT OF APPEAL OF SWAZILAND *

HOLDEN AT MBABANE ON THE 13th DAY OF NOVEMBER 2006 BEFORE THEIR LORDSHIPS MR JUSTICE TEBBUTT, MR JUSTICE ZIETSMAN AND MR JUSTICE RAMODIBEDI.

CIV.T. NO:.47/2006

In the matter between:

SWAZI EXPRESS AIRWAYS (PTY) LIMITED

Appellant

and

THE HONOURABLE MINISTER OF

FOREIGN AFFAIRS AND TRADE 1st

Respondent

THE GOVERNMENT OF THE KINGDOM OF SWAZILAND 2na

Respondent

THE HONOURABLE MINISTER OF PUBLIC WORKS AND TRANSPORT 3rd
Respondent

THE PRINCIPAL SECRETARY OF THE MINISTRY OF PUBLIC WORKS AND TRANSPORT 4th
Respondent

THE DIRECTOR OF CIVIL AVIATION 5th
Respondent

THE CHAIRPERSON OF AIR TRANSPORT LICENCING AUTHORITY 6th Respondent

AIRLINK SWAZILAND LIMITED 7th
Respondent

THE ATTORNEY-GENERAL OF THE KINGDOM OF SWAZILAND
Respondent

8th

CONSENT ORDER

By agreement of the parties, the following order is made;

1. The appeal lodged by the seventh respondent with the Minister of Public Works and Transport ("the Minister") against the grant of the licence to the appellant by the Air Transport Licensing Authority is referred for adjudication to the panel of adjudicators referred to below;

2. The panel of adjudicators is to be composed as follows;

2.1. one member shall be a retired Judge, Senior Counsel or other expert in law;

2.2. the second member shall be an expert in the Airline Industry.

3. The appellant a nd the seventh respondent shall endeavour to reach agreement on the selection of the two adjudicators by no later than 27th November 2006.

4. Should they fail to reach such agreement, the adjudicators shall be appointed by the Chairman of the Johannesburg Bar Council.

5. The adjudicators shall have the power to decide the appeal on the same basis and following the same process as would apply if the Minister were to decide the appeal.

6. The decision of the adjudicators shall be final and binding on the parties and shall for all purposes be deemed to be that of the Minister under the applicable legislation.

7. The adjudicators shall, subject to the legislation applicable to the determination of appeals to the Minister, determine the process to be followed in the conduct of the appeal.

8. The appeal proceedings shall be conducted in Johannesburg at a venue to be agreed by the parties or determined by the adjudicators.

9. The date for the hearing shall be determined by the adjudicators in consultation with the parties, provided that;

9.1. the hearing shall take place during the period from 22nd to 31st January 2007;

9.2. the adjudication process shall be concluded by 31st January 2007;

9.3. the parties shall make all reasonable endeavours to ensure the expeditious handling and conclusion of the adjudication process.

10. The costs in respect of the adjudication process, in particular the costs of the adjudicators, the venue and the recording of proceedings shall be borne equally by the appellant and the seventh respondent. The appellant and the seventh respondent shall each bear its own costs of the appeal to the Swaziland Court of Appeal.

BY ORDER OF THE COURT OF APPEAL GIVEN UNDER MY HAND AT MBABANE THIS DAY OF NOVEMBER, 2006.

REGISTRAR OF THE COURT OF APPEAL MBABANE

KJM/srf/S.248D

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CIV.T. NO:.47/2006

In the matter between:

SWAZI EXPRESS AIRWAYS (PTY) LIMITED Appellant

and

THE HONOURABLE MINISTER OF

FOREIGN AFFAIRS AND TRADE 1st Respondent

THE GOVERNMENT OF THE KINGDOM OF SWAZILAND 2na Respondent

THE HONOURABLE MINISTER OF PUBLIC WORKS AND TRANSPORT 3rd Respondent

THE PRINCIPAL SECRETARY OF THE MINISTRY OF PUBLIC WORKS AND TRANSPORT 4th Respondent

THE DIRECTOR OF CIVIL AVIATION	5th Respondent
THE CHAIRPERSON OF AIR TRANSPORT LICENCING AUTHORITY	6th Respondent
AIRLINK SWAZILAND LIMITED	7th Respondent
THE ATTORNEY-GENERAL OF THE KINGDOM OF SWAZILAND	8th Respondent

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