

IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

CASE NO. 2235/06

In the matter between:

SWAZI EXPRESS AIRWAY (PTY) LTD

APPLICANT

AND

THE HONOURABLE MINISTER OF
FOREIGN AFFAIRS AND TRADE

1st RESPONDENT

THE GOVERNMENT OF THE
KINGDOM OF SWAZILAND

2nd RESPONDENT

THE HONOURABLE MINISTER
FOR PUBLIC WORKS AND TRANSPORT 3rd RESPONDENT

THE PRINCIPAL SECRETARY 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

ATTORNEY GENERAL OF THE
KINGDOM OF SWAZILAND

8th RESPONDENT

CORAM: MAMBA AJ

FOR APPLICANT: P. KENNEDY SC (instructed by K.
Motsa of Robinson Bertram)

FOR 1st - 5th & 8th RESPONDENTS: MR. J. MAGAGULA

FOR 7th RESPONDENT: (COUNSEL INSTRUCTED BY
MLANGENI & CO)

JUDGEMENT

3/10/06

[1] The following facts are either common cause or not
disputed,

(a) The seventh respondent, Airlink SD LTD, is a
company duly incorporated with limited liability in
terms of the company laws of Swaziland and is

carrying on business as a commercial airline from Matsapha in Manzini to various destinations from that airport.

(b) The Government of Swaziland, which is the second respondent herein holds 60% of the issued share capital of the 7th respondent.

(c) The applicant which is a registered Swaziland air charter company applied to the Licensing Authority, chaired by the 6th respondent for a license to operate the Matsapha/O.R. Tambo Airport route. This application was successful or granted on 17/01/06 despite it being opposed by the 4th and 7th Respondents.

(d) On the 3rd day of February 2006, the 7th Respondent noted and filed its appeal against the decision of the Licensing Authority to grant an air license to the applicant.

(e) In terms of the relevant aviation regulations, 2002 such appeal lies with the Minister of Public Works and Transport, the 3rd Respondent in his or her capacity as such Minister and representative of the 2nd Respondent.

(f) The 3rd Respondent has, notwithstanding repeated requests by the applicant, for him to call and hear the appeal failed to do so. In his opposing affidavit to this application, which was signed on the 18th day of July, 2006 the 3rd Respondent has conceded that he is disqualified from hearing the appeal because of the fact that the Government of which he is a Minister is a party in the appeal proceedings and was an

objector before the Licensing authority which granted the license.

(g) There are only sixteen frequencies per week allotted to Swaziland on the Matsapha /OR Tambo Airport route.

(h) The air license granted to the applicant by the Licensing Authority was subject to the applicant and 7th respondent reaching a consensus on sharing these frequencies and agreeing on their respective timetables or schedules.

(i) The 7th Respondent's stance is that, pending its appeal, the 7th Respondent is not prepared to discuss to share the frequencies with the applicant.

[2] Based on the above facts and or circumstances, the applicant has filed this application seeking orders in two parts or categories: namely PART A and PART B.

[3] The 3rd Respondent has conceded in his opposing affidavit that as a Minister of the Government, he is disqualified from hearing the appeal as the Government he represents is a party in the appeal proceedings.

[4] The 3rd Respondent has after almost six months of deliberations effectively recused himself from hearing the appeal. He says he was unable to obtain legal advice on this

issue before this application was served on him. The papers filed herein strongly **suggest**, that the 3rd respondent sought legal advice and or opinion from the office of the Attorney General some time before the 19th day of May, 2006 (see memorandum from Minister to Attorney General dated 19/5/06 at page 214 of the Book of Pleadings). Why the office of the Attorney General could not provide such legal advice or opinion to the Minister before the 18th July 2006, on a simple and elementary an issue as this, is to say the least, surprising and disturbing.

[5] The grant of the air license to the 7th Respondent and government dissatisfaction therewith was widely publicized in Swaziland, as the papers herein show. The dissatisfaction or position of the government on the issue was, in no small measure, being articulated and or championed by the 4th Respondent (Madlopha), the administrative head of the Ministry of Public Works and Transport. The 3rd respondent who is the Minister in that Ministry and to whom the appeal lies and with whom it was filed ought to have realized before the 18th day of July 2006 that he could not hear the appeal. Had he done so before this application for a declaration that he is disqualified from hearing the appeal, this application for such declaration would have been unnecessary.

[6] The 3rd Respondent has since conceded that he is disqualified from hearing the appeal and that being the case, there is no need for this court to grant prayers 2 and

3 in part B of this application. Prayer 1 of part B is, however, granted as prayed and conceded by the 3rd respondent.

[7] As stated above, the grant of the air license to the applicant was subject to the applicant and the 7th Respondent reaching a consensus on their respective timetables or schedule and sharing of the weekly frequencies. This has not been accomplished, principally because the 7th respondent has taken the view that it has to prosecute and finalise its appeal first.

[8] In argument before me, I did not understand Counsel for the applicant to be insisting on any of the prayers in part A nor do I think applicant is entitled to any of those prayers in the circumstances.

[9] 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 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 disqualification 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.

[10] It is apparent to me though that all the parties who have an interest in the appeal are anxious to have the appeal, if it still exists, heard and finalized sooner rather than later.

[11] It is, generally, not the business or role of the court to advise or order litigants on how they should prosecute or conduct their respective suits. This case is full of special circumstances and it falls outside the general rule. I was not referred to any case in point nor have I come across any comparable cases in the course of preparing this judgement.

[12] The prayer to declare the Minister disqualified from hearing the appeal is in effect an application for his recusal. The general rule is that such application must be made before the official whose recusal is sought. In casu the applicant has not done this but has come straight to this court and has in argument sought to justify its action by stating that it could not move this application before the 3rd Respondent because he had not set-down the appeal for hearing as that would have been the only chance for the applicant to move the recusal application. A specific application could and should have been filed and set down by the applicant before the 3rd Respondent for the latter to recuse himself. The applicant's failure in this regard is, in my judgement not fatal to its present application *moreso* because of the 3rd Respondent's concession that he is indeed disqualified from hearing the appeal.

The issue of costs has presented some difficulties herein. 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.

I am unable to apportion blame on the 7th respondent for the events that gave rise to this application. The 7th respondent's opposition to the disqualification of the 3rd respondent is without any merit though.

[15] In the light of the above special features of this application, in the exercise of my discretion, I think it would be in the best interests of justice that each party be left to bear its own costs.

[16] I make the following orders :

1. The 3rd Respondent is declared (as conceded by him) disqualified from hearing the appeal as prayed for in prayer 1 of the 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 of the application.

[17] By consent the case is postponed to the 16th day of October, 2006 for orders on the prosecution or conduct of the 7th Respondent's appeal.

MAMBA, AJ