

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2024/00100

In the matter between:

FLYNAMIBIA AVIATION (PTY) LTD

APPLICANT

and

**THE CHAIRPERSON OF THE TRANSPORTATION
COMMISSION OF NAMIBIA**

FIRST RESPONDENT

THE MINISTER OF WORKS AND TRANSPORT

SECOND RESPONDENT

Neutral citation: *FlyNamibia Aviation (Pty) Ltd v The Chairperson of the Transportation Commission of Namibia* (HC-MD-CIV-MOT-GEN-2024/00100) [2024] NAHCMD 120 (18 March 2024)

Coram: SCHIMMING-CHASE J

Heard: 15 March 2024

Delivered: 18 March 2024

Flynote: Practice — Urgency — Rule 73 — Applicant to set forth explicitly the circumstances which render the matter urgent and reasons why substantial

redress cannot be obtained in due course.

Legislation — Air Services Act 51 of 1949 — Section 12 — Scheduled Air Transport Service License — Must be renewed every five years — Renewal application must be lodged 12 months prior to the expiry of the license.

Legislation — Air Services Act 51 of 1949 — Section 7(4) and (5) — The Commission has the power to condone non-compliances with the provisions of the Air Services Act 51 of 1949.

Legislation — Air Services Act 51 of 1949 — Section 19 — Exemptions — The section is not applicable in the instance of a party seeking condonation for non-compliance with the provisions of the Act.

Statute — Interpretation — Golden rule of interpretation — Words to be given ordinary grammatical meaning-Context in which document drafted always relevant to construction.

Review — A functionary must not abdicate the responsibility to consider each case on its merits.

Summary: In this urgent application brought by FlyNamibia (Pty) Ltd ('Fly Namibia'), an air carrier within the meaning of the Air Services Act 51 of 1949 ('the Act'), it sought interim interdictory relief against the Transportation Commission of Namibia ('the Commission') under Part A, and review relief under Part B of its notice of motion. The basis for the relief is a decision taken by the Commission on 7 March 2024 (and communicated to Fly Namibia on 8 March 2024), to refuse Fly Namibia's application for renewal of its license to carry on an air service. Part of Fly Namibia's application for renewal of its license encompassed a substantive application for condonation for the late filing of the application for renewal, which was approximately eight months late.

At the time that the urgent application was launched, Fly Namibia was not aware of the reasons for the Commission's refusal, which were only provided by the

Commission on 13 March 2024, one day after service of the urgent application on the Commission. Fly Namibia filed a supplementary affidavit containing the Commission's reasons for the refusal of the application.

The reason for the Commission's refusal of the license, *ex facie* its formal correspondence, is that it does not have the power to hear applications for condonation, as s 19 of the Act only permits it to consider applications for condonation for 'exemption from compliance' in circumstances where the air carrier concerned is providing, or proposes to provide, an air service on a non-profit basis for charitable purposes or for purposes incidental to social welfare, or that the grant of an exemption will assist in saving life.

It was submitted by Fly Namibia that given the reasons provided by the Commission, a case is made out for an order reviewing and setting aside the Commission's decision in terms of rule 76, because the basis for the decision does not fall within the circumstances contemplated by s 19(1) of the Act, which is a misapplication of the applicable legislation and a vitiating irregularity.

The Commission did not oppose the application. No answering papers were filed to assist the court. There was also no appearance by or on behalf of the Commission on 15 March 2024 when the matter was called, despite service of the application and a hearing notice issued by this court. The court is therefore in these circumstances constrained to determine the application on the founding papers only.

Held that, the applicant has made out a case in its founding papers that the matter is urgent and that it will not receive substantial redress in due course. Condonation is granted for the applicant's non-compliance with the rules of court relating to service and time limits as prescribed by rule 73(3), and the matter is heard as urgent.

Held further that, the cardinal rule of construction is that words of a statute must be given their ordinary literal or grammatical meaning if the words are clear and unambiguous, unless it is apparent that such literal construction would lead to

manifest absurdity, inconsistency, injustice or would be contrary to the intention of the legislature.

Held further that, the Act specifically provides for the licensing and control of air carriers and air services in Namibia. Section 3 of the Act specifically grants the Commission the functionary powers to, inter alia, determine applications for licenses as well as renewal of applications for licenses of air carriers.

Held further that, condonation was sought for the late submission of the license renewal application in terms of s 7(4) and (5) of the Act, which provides that the Commission has the discretion to impose that a non-compliant party pay the Commission a deposit of N\$4000 within a stated time as a condition of condonation. It would be absurd if the entity responsible for licensing of air carriers would not have the jurisdiction to consider an application for condonation for non-compliance with the Act's provisions.

Held further that, it is clear, given the purpose of the legislation and the Commission's statutory powers to govern the issue and renewal of licenses to air carriers in the aviation industry, that the Commission has the power to consider and determine an application for condonation for non-compliance with the Act, and that same should be considered in a judicially acceptable manner.

Held further that, s 19 of the Act deals with a different issue, namely, the issue of exemptions, and provides for circumstances in which an air carrier may be exempted from complying with the provisions of the Act. Only an air carrier carrying on an air service on a non-profit basis for charitable purposes or for purposes incidental to social welfare can apply for the exemption.

Held further that, the Commission did not apply its mind to the legislative provisions at all, which constitutes an irregularity within the meaning of Article 18 of the Constitution, and its decision must be set aside. The matter is referred back to the Commission to fully and properly consider the applicant's application for renewal, inclusive of the application for condonation.

ORDER

1. The applicant's non-compliance with the rules relating to service and time limits as set out in rule 73 of the rules of this court is dispensed with, and the matter is heard as urgent.
2. The Transportation Commission of Namibia's decision made on 7 March 2024, to decline the applicant's application in respect of condonation and renewal of Air Transport Service Licence No 00031, is hereby reviewed and set aside, and the matter is referred back to the Commission to determine the applicant's condonation and renewal applications *de novo*.
3. There shall be no order as to costs.
4. The matter is finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

[1] The applicant is FlyNamibia Aviation (Pty) Ltd ('Fly Namibia'), a private limited liability company duly incorporated under the relevant company laws of Namibia. The applicant was formerly registered as Westair Aviation (Pty) Ltd.

[2] The first respondent is the Chairperson of the Transportation Commission of Namibia ('The Chairperson') cited herein under rule 76(1) of the rules, an administrative body originally established by an amalgamation of the statutory bodies mentioned under s 8 of the Transport (Co-ordination) Act, 1948 and formed by s 2 of the Road Traffic and Transportation Act, 1999.

[3] The Chairperson is the head of the Transport Commission of Namibia ('the Commission'). Part of the statutory function(s) of the Commission in terms of s 3 of the Air Services Act 51 of 1949 ('the Act'), is to hear and determine any application by an air carrier for, inter alia, the granting or renewal of a Scheduled Air Transport Service License.

[4] The second respondent is the Minister of Works and Transport, cited in his official capacity as the line minister responsible for transport within the government. The Minister is cited herein so far as he may have an interest in the matter, and no relief is sought against him.

[5] According to the founding papers, Fly Namibia currently operates scheduled regional air services over Namibia as well as international flights between Windhoek and Cape Town, South Africa. It is the holder of a Scheduled Air Transport Service License No. 31 ('the license'), which was first issued to it on 28 March 1995. The license was renewed from time to time and in particular on 28 March 2019 in terms of s 12(1) of the Act.¹ The license is set to expire on 28 March 2024.

[6] In the event that the license expires, the air carrier operating certificate ('AOC') issued by the Director of the Namibia Civil Aviation Authority ('NCAA') under s 5 of the Civil Aviation Act 74 of 1962 expires simultaneously therewith under s 13(1) of the Act. It was intimated to this court that it takes approximately two to five years for the AOC to be issued by the NCAA's Director.

[7] In terms of s 12(2) of the Act, a renewal of the license application must be lodged with the Commission 12 months prior to its expiry date. In this regard, Fly Namibia's renewal application was due on 28 March 2023. The renewal application was only lodged with the Commission, on 3 November 2023, together with an extensive and substantial condonation application for

¹ Section 12(1) provides that the license may be granted for an initial period of seven years subject to the same being renewed for a period not exceeding five years.

the late application for the renewal of the license. The application was subsequently published in the Government Gazette on 5 December 2023 in compliance with s 5 of the Act.

[8] The Commission heard Fly Namibia's application on 20 February 2024 and representations were made by members of Fly Namibia. The Commission undertook to render its decision within seven days, being 27 February 2024. The Commission's decision was communicated to Fly Namibia's legal practitioner, Mr Shaun Ellis, on 8 March 2024. The decision is dated 7 March 2024. The Commission refused Fly Namibia's application for the renewal of its license. The relevant portion of the Commission's letter reads as follows:

'1. Reference is made to the applications for the Renewal of Air Services Licenses 00031, first issued on 28 March 1995, and the representations made in respect thereof at the meeting of the Transportation Commission of Namibia convened on 20th February 2024.

2. Upon consideration of the application and submissions made during the hearing by yourself, the Transportation Commission of Namibia regrets to inform you that the application for renewal has been refused.

...' (Emphasis added.)

[9] On 8 March 2024, reasons for the decision were requested from the Commission in terms of s 3(3) of the Act, which were only provided to Fly Namibia on 13 March 2024.

[10] Given the looming expiry date of Fly Namibia's license, namely, 28 March 2024, it launched an urgent application on 12 March 2024 seeking the following relief:

'1 Part A of application:

1.1 Dispensing with full and proper compliance with the Rules relating to service and time limits as set out in Rule 73(3) of the Rules of this Honourable Court, by reason of the urgency of the matter.

1.2 The Applicant's late filing of its application to the Transportation Commission of Namibia "the Commission " for the renewal of Applicant's scheduled Air Transportation Service License No. 31 is condoned, and the matter is referred back to the Commission to deal with the pending application on its merits; alternatively.

1.3 Suspending the implementation and effect of the First Respondent's decision dated 7 March 2024 to refuse the renewal of the Applicant's Scheduled Air Transport Service License No. 31, pending the final determination of the review application in Part B.

1.4 That the Applicant's Scheduled Air Transport Service License No. 31 be deemed to continue in force, pending the final determination of the review application in Part B.

1.5 Ordering the First Respondent and any other respondents who may oppose the relief sought in this part application, to pay the costs of this application (jointly and severally, the one paying the others to be absolved, if more than one respondent should oppose), such costs to include the costs of one instructing and two instructed counsels.

1.6 Granting the Applicant such further and/or alternative relief as this Honourable Court may deem fit.

2 Part B of application:

2.1 Reviewing and setting aside the decision by the First Respondent, dated 7 March 2024, to refuse the renewal of the Applicant's Scheduled Air Transport Service License No. 31 (the "License").

2.2 Renewing the License; alternatively, to refer the application for renewal of the License back to the First Respondent and directing it to renew and issue the License, subject to such conditions as it may consider necessary and which it may validly impose in terms of section 11(3) of the Air Services Act No. 51 of 1949, in the further

alternative that the application for renewal of the License be referred back to the Commission and it be directed to reconsider the renewal application and make a ruling within 14 days of this order, in the further alternative, granting condonation for the late filing of applicant's application, and referring it back to the Commission to determine the merits of applicant's renewal application.

2.3 Ordering the First Respondent and any other respondents who may oppose the relief sought in this part application, to pay the costs of this application (jointly and severally, the one paying the others to be absolved, if more than one respondent should oppose), such costs to include the costs of one instructing and two instructed counsels.

2.4 Granting the Applicant such further and/or alternative relief as this Honourable Court may deem fit.'

[11] The application was served on the Chairperson and the Minister on 12 March 2024 at 16h42 on a Ms Alexia Katjuongua and at 16h38 on a Maureen Meyer, respectively, at 7th Floor, Ministry of Works and Transport, Bell Street, Snyman Circle, Windhoek.

[12] A hearing notice was issued by this court on 13 March 2024 at 10h51 directing the parties to appear at court at 09h00 on 15 March 2024. On 14 March 2024 at 14h44, Fly Namibia filed of record a supplementary affidavit seeking leave to file a supplementary affidavit. This supplementary affidavit was not served on the Commission.

[13] By 15 March 2024 at 09h00, when the matter was called for hearing, no opposition was noted by or on behalf of the respondents, specifically the Commission, the maker of the decision that Fly Namibia seeks to eventually have impugned and set aside on review. No appearance was entered by or on behalf of the Commission either. In the absence of any opposition in any way or form, I am constrained to deal with the application on the founding papers.

[14] Mr Heathcote SC, assisted by Mr Dicks, appears for Fly Namibia.

[15] Mr Heathcote submits that Fly Namibia has explicitly set forth the circumstances that render the matter urgent and why substantial redress cannot be obtained in due course.² He also submits that a case has been made out for final review relief, without the necessity of a record, in light of the reasons for the decision of the Commission which were provided on 13 March 2024, dealt with below. This is because, according to Mr Heathcote, it is clear that the Commission, as matter of fact and law failed to apply its mind to the renewal application when it was considered.

[16] In spite of the fact that no opposition is registered, I bear in mind that the applicant draws the onus for the relief sought. I am further of the view that an applicant is entitled to have the question of urgency decided on the basis that she is entitled to the relief sought on the merits of the application.³

[17] Based on the founding papers, I am of the considered view that Fly Namibia has complied with the trite principles relating to urgent applications. The decision was received on 8 March 2024. The application was launched and served on 12 March 2024. Fly Namibia's license is set to expire on 28 March 2023. In the event that the license expires, the AOC issued by the NCAA's Direction expires simultaneously therewith.⁴ This will immediately bring all of Fly Namibia's operations to an immediate halt.

[18] Although the founding papers are voluminous, the question to be determined is crisp, given the reasons for refusal provided by the Commission. In this regard, Fly Namibia was constrained to file a supplementary affidavit on 14 March 2024, when the Commission provided the reasons for its decision under s 3(3) of the Act on 13 March 2024, after service of the urgent application. For the reasons advanced below, and in the

² High Court Rule 73(4); See also *Lewcor Holdings (Pty) Ltd v Spergebiet Diamond Mining (Pty) Ltd* (HC-MD-CIV-ACT-MOT-GEN-2024/00005) [2024] NAHCMD 39 (9 February 2024) paras 23-24..

³ *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 (E) at 213; See also *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G.

⁴ Section 13(1) of the Act read with s 5 of the Civil Aviation Act 74 of 1962.

absence of any opposition from the Commission, I accept the filing of a supplementary affidavit.

[19] The Commission's reasons, in essence, are that the renewal application was lodged late and in non-compliance with s 12(2) of the Act and that under s 19(1) of the Act, the Commission 'does not have the power to permissibly exempt non-compliance outside the ambit of section 19(1)'. It is, thus, apparent from the reasoning of the Commission that it did not consider the condonation application because it does not have the power or jurisdiction to do so under s 19 of the Act.

[20] Fly Namibia's position is that the condonation application was brought in terms of s 7(4) and (5) of the Act, which is the applicable section dealing with condonation in terms of the Act. In addition, it was submitted that s 19 was the incorrect provision utilised by the Commission to abdicate, as it were, its decision-making functions. Thus, it was submitted that a case is made out for final review relief on a proper interpretation of s 19 and s 7(4) and (5) of the Act.

[21] I am constrained to answer the question of whether the provisions of the aforesaid s 7 afford the Commission the power to consider and grant condonation for non-compliance with the provisions of the Act.

[22] The now trite cardinal rule of interpretation of statutes is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment, and that in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.⁵

⁵ *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129; See also *Radial Truss Industries (Pty) Ltd v Chairperson of the Central Procurement Board of Namibia and Others* 2021 (3) NR 752 (HC) para 28.

[23] Words of a statute must also be given their ordinary literal or grammatical meaning if the words are clear and unambiguous, unless it is apparent that such literal construction would lead to manifest absurdity, inconsistency, injustice or would be contrary to the intention of the legislature.⁶

[24] A reformulation of this approach was advanced in the Supreme Court decision of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*⁷, resulting in a modern contextual approach to interpretation formulated thus:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[25] I note at the outset that the Act specifically provides for the licensing and control of air carriers and air services. That is its purpose within the context of the airline industry. Section 3 of the Act expressly grants the Commission the functionary powers to, inter alia, determine and grant applications for licenses of air carriers and for renewal of those licenses. As part of its renewal application, and because it was late in submitting the

⁶ *Torbitt and Others v International University of Management* 2017 (2) NR 323 (SC).

⁷ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) para 18, approving *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 13.

application for the license, Fly Namibia also filed a substantive application for condonation of the late renewal application in terms of s 7(4) and (5) of the Act.

[26] There is no gainsaying that in spite of representations made to the Commission at its meeting of 20 February 2024, the Commission, *per* its reasons, determined the application in terms of s 19, and not s 7(4) and (5). It does not even appear from the reasons that s7(4) and (5) were considered.

[27] Section 19 of the Act, by its heading, deals with exemptions and provides for circumstances in which an air carrier may be exempted from complying with provisions of the Act. The provision is quite clear as to what jurisdictional facts must be present for an exemption to be considered. There is also, to my mind, a difference between an exemption from complying with provisions, and application for relief from non-compliance with a section. It is clear that Fly Namibia never applied for an exemption in any event.

[28] I consider this further in view of the averments made by the deponent in the applicant's founding affidavit, to the effect that no questions were directed to the applicant's representatives during the hearing of 20 February 2024 on the applicability of s 19, given that it did not form part of Fly Namibia's condonation application.

[29] To my mind, the only provision in the Act that creates room for condonation is s 7(4) and (5) which provide in clear terms the following:

'(4) The commission may, as a condition of condonation of any default by an applicant or objector in complying with the prescribed procedure of application or objection, or of the grant of postponement or other indulgence, require such applicant, objector or party seeking indulgence to deposit with the commission a sum not exceeding R4 000 within a stated time.

(5) If the commission is satisfied that the making of an application which it has refused or of an objection which it has disallowed, or the default of or grant of

indulgence to an applicant or objector, has caused unnecessary expense to another party to the proceedings, the commission may in its discretion order that out of any deposit made under sub-section (3) or sub-section (4) by such applicant or objector, such sum of money as it may think fit be paid to the party so damnified in reimbursement or part reimbursement of costs incurred by him, and may order further that there be paid out of the said deposit into the State Revenue Fund such sum as it may think fit. The remainder of any sum deposited or, if no such order is made, the whole of the sum deposited, shall be returned to the depositor.’ (Emphasis added.)

[30] Apart from the fact that the section specifically provides for the procedure for condonation, and s 19 deals with a completely different scenario – exemptions; it becomes apparent that the Commission, as the entity dealing with granting of licenses, must have the power to consider a non-compliance with the Act, given the nature of the aviation industry, and events that may happen, which would create non-compliances with the Act. This is the only reasonable and sensible interpretation of s 7(4) and (5) that does not give rise to absurdity.

[31] It was also the evidence of Mr Phillip Ellis, a legal practitioner of this court, who deposed to a supporting affidavit, that in his experience of the Namibia aviation sector since the early 1990’s, he has on more than one occasion seen during meetings/hearings of the Commission, that the Commission would consider applications for condonation. He further attached Government Gazette of 13 January 2003 in which an application for a renewal of a transport license together with an application for condonation was published for an entity called African Balloons CC.

[32] It is therefore my view that the Commission is required by s 7(4) and (5) to apply its mind and substantially consider the condonation application as part of the renewal application.

[33] In the result, the reasons given by the Commission patently show that it did not apply its mind properly or at all to the condonation application when it

reasoned that it did not have the power to consider a condonation application in light of s 19. This is a clear breach of the Commission's Article 18 responsibilities and is a vitiating irregularity. Accordingly, Fly Namibia has made out a case on its papers for the decision to be set aside in its entirety, and for it to be ordered to reconsider the renewal application (in terms of the provisions of the Act) together with the condonation application (applying judicially accepted principles) *de novo*, and not to abdicate its powers.

[34] Before I conclude, I note that s 12(4) of the Act⁸ protects Fly Namibia's license from lapsing even after the expiry date should the renewal application still have to be finally determined.

[35] In light of the foregoing, I make the following order:

1. The applicant's non-compliance with the rules relating to service and time limits as set out in rule 73 of the rules of this court is dispensed with, and the matter is heard as urgent.
2. The Transportation Commission of Namibia's decision made on 7 March 2024, to decline the applicant's application in respect of condonation and renewal of Air Transport Service Licence No 00031, is hereby reviewed and set aside, and the matter is referred back to the Commission to determine the applicant's condonation and renewal applications *de novo*.
3. There shall be no order as to costs.
4. The matter is finalised and removed from the roll.

⁸ Section 12(4) provides that if at the date on which the license expires, proceedings are pending on an application for the renewal of the license, the expired license shall be deemed to continue in force until such application has been finally determined.

E M SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT: R Heathcote SC (assisted by G Dicks)
Instructed by Ellis & Partners, Windhoek

RESPONDENTS: No appearance