THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 39/2006

In the matter between:

WILLEM JOHANNES CLAASE APPELLANT

and

THE INFORMATION OFFICER OF SOUTH AFRICAN AIRWAYS (PTY) LIMITED RESPONDENT

Coram: MPATI DP, BRAND, CLOETE, MLAMBO JJA *et* COMBRINCK AJA

Date of hearing: 20 NOVEMBER 2006

Date of delivery: 30 NOVEMBER 2006

Summary: Request for information in terms of s 50 of Promotion of Access to Information Act 2 of 2000 – standard of proof in application – when access unreasonably denied – punitive costs order

Neutral Citation: This judgment may be referred to as *Claase v Information Officer of South African Airways* [2006] SCA 163 (RSA)

JUDGMENT

COMBRINCK AJA/….

COMBRINCK AJA:

[1] It is unfortunate that the Promotion of Access to Information Act 2 of 2000 ('the Act') which (as appears from the preamble) was intended to:

'* foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;

* actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights,'

should result in pre-trial litigation involving huge costs before the merits of the matter are aired in court. One of the objects of the legislation is to avoid litigation rather than propagate it. This is the fourth case in which information has been sought in terms of the Act that has in the past eighteen months required the attention of this court. I refer to *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA), *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) and *MEC for Roads and Public Works v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA). The present appeal illustrates how a disregard of the aims of the Act and the absence of common sense and reasonableness has resulted in this court having to deal with a matter which should never have required litigation.

[2] The facts are straight forward, and save for one crucial issue, not in dispute. The appellant is a retired airline pilot. He worked for SAA for 30 years and as part of his retirement package he was entitled to two free business class tickets on any of SAA's international flights every year. He had two such tickets. He had travelled to New York and was booked to return to Johannesburg on 20 August 2004. On the 14th August 2004 he wished to fly from New York where he and his companion were, to Johannesburg on SAA's flight 204. On the previous day he had telephonically attempted to make a booking in New York but this was refused. He and his companion then went to the SAA counter at J F Kennedy airport to make the booking. One of the personnel at the weigh-in counter told him that there were seats available in business class. He was told however by

the official in charge of the counter that she could not allocate him seats until the booking had closed. He then waited for the counter to close. Instead of being served first (he had arrived first) he was told to fall in at the back of the queue. He witnessed passengers being upgraded from economy class to business class. When his turn came he was told that there was only one seat remaining in business class and he or his companion would have to travel economy class. He refused to accept this and returned to his hotel. The next evening, after making a booking through SAA's Johannesburg offices, he was given two seats in business class on the Johannesburg flight. The crucial disputed issue is whether, when appellant attempted to make a booking on flight SA 204, there were seats available in business class.

[3] The appellant intends suing SAA for damages for breach of contract. In order to establish whether there were seats available in business class on the particular flight he telephonically contacted an employee of SAA, Mr Michael Brewis. He was told that records of the seats available were in his (Brewis') possession on his computer but that he could not without authorization part with them. Appellant then in a series of e-mails from the 25th August 2004 to 9th February 2005 sought the information contained in those records, without success. On the 5th November 2004 in terms of s 53 he submitted to SAA a 'Request for Access to Records' on the form prescribed by regulation 4. In response he was advised by e-mail on the 8th February 2005 that there had been 37 passengers in business class on the particular flight and 220 in economy class. This information was, as SAA must have known, of no use to him. The record was not supplied.

[4] Having still not been afforded access to SAA's records of the flight and more particularly the record on Brewis' computer, the appellant launched an application in the Pretoria High Court. In paragraph 2 of the Notice of Motion he sought an order compelling SAA to furnish him with records reflecting: (a) the number of bookable seats in business and economy class on flight SA 204; (b)

the number of seats booked in each class; (c) the number of people who arrived to take up their seats in the respective classes and (d) the number of passengers upgraded from economy to business class. In paragraph 3 of the Notice of Motion the appellant sought attorney and client costs. The application was vigorously opposed by SAA on a number of grounds, some of which were clearly without foundation.

[5] The court *a quo* found against appellant on two grounds. First, it held that the agreement regulating appellant's right to two free tickets did not entitle him to a seat unless he had a confirmed reservation on the particular flight. He did not have a reservation on flight SA 204 and was correctly, so it was held, treated as a standby passenger. He therefore failed to establish a right which was in need of protection. Second, it was found that the information given by SAA as to the number of passengers in business class on the flight was sufficient for appellant's purposes. Accordingly, so it was said, he '*. . . failed to establish that SAA had failed to provide him with information necessary for him to exercise or protect a right conferred on him by the agreement'.*

[6] What an applicant needs to prove when seeking to exercise his rights in terms of ss 50(1) of the Act has been dealt with in detail by this court in the cases referred to in para [1] above. To these cases may be added *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA). Brand JA in the *Unitas Hospital* case (*supra*) remarked that: 'Generally speaking, the question whether a particular record is "required" for the exercise or protection of a particular right is inextricably bound up with facts of that matter'. (Para [6].)

[7] The right which the appellant relies on and which he seeks to protect is a contractual one and is to be found in the so-called 'Regulating Agreement' governing the conditions of retirement of SAA pilots. The relevant clauses are clauses 1.2 , 1.7 and 1.8. They read as follows:

'1.2 A pilot with five years service shall be granted two confirmed domestic 100% rebated tickets and two confirmed international 100% rebated tickets, and unlimited 90% rebated domestic and international tickets on a seat available basis.

. . .

1.7 Confirmed reservations may be made up to 90 days in advance in respect of the above 100% rebated tickets. Such reservations constitute a contractual right and the holders of such confirmed reservations shall not be offloaded under any circumstances at any time.

1.8 A pilot who retires from the services of the COMPANY, spouse and dependent children shall be granted travel benefits in accordance with 1.1 to 1.2 above. Confirmed reservations may be made up to 90 days in advance in respect of the 100% rebated domestic ticket and in respect of the 100% rebated international ticket. All other tickets are granted on a seat available basis. Any additional travel benefits granted in terms of 1.1 to 1.2 above shall also be granted to such retirees.'

As I interpret these clauses on the information available to this court (it is undesirable to express a final view) appellant has, in recognition of his service, the right to two tickets in business class on any of SAA's international routes. He has the right to make a confirmed reservation up to 90 days in advance. Within that period he may make reservations as long as there are seats available at that time. He does not have to wait until normal reservations by the public close before he may make a reservation. Once he makes a reservation, or even changes his reservation, as any member of the public is entitled to, his right to be conveyed in business class is established. I cannot accept the reasoning of the court *a quo* that because the appellant had a reservation for the 20th August 2004 he only had a right to be on that flight and in respect of any other flight he was correctly treated as a stand-by passenger.

[8] Counsel for appellant suggested that in an application for information in terms of s 50 the applicant need only put up facts which *prima facie*, though open to some doubt, establish that he has a right which access to the record is required to exercise or protect. I agree. I consider the traditional standard of proof in applications for an interim interdict to be appropriate. I am satisfied applying

that test that appellant established that he does have such a right. The record he seeks is a computer printout, which will determine whether there were seats available in business class on that particular flight when he sought to make a booking. He has put up evidence that *prima facie* proves that there were. Not only does he say that he was told so by an unknown employee of SAA but he personally witnessed economy class passengers being upgraded. In his founding affidavit appellant avers that he had been told by Brewis that the record containing the details sought by appellant exists and that he (Brewis) had sent it through to SAA's Client Service department. In the answering affidavit these allegations are not dealt with and neither is an affidavit put up by Brewis to refute them. They stand unchallenged.

[9] The next question is whether access to the record sought is 'required' for the protection of the right. In *Clutchco* para [13] (followed in *Unitas* para [17]) this court said:

'I think that "reasonably required" in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need.'

The substantial advantage in this matter consists in the fact that the contents of the record would be decisive. (*Unitas* para [54]) ie they would bring a short sharp end to the dispute (*Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 848G.) They would either confirm the appellant's contentions in which event SAA would apparently have no defence, or they would support the latter's case in which event the appellant would obviously, as his counsel said in argument, not proceed with the proposed litigation. SAA's reluctance to produce the document in these circumstances is inexplicable.

[11] The second ground upon which the application failed in the court below need not detain us. It was held that the information extracted from its records in New York by SAA and forwarded by e-mail to appellant was sufficient for his

purposes and in compliance with s 50. The short answer is that what appellant requested, and was entitled to obtain, was access to the actual record of the flight kept by Brewis. Section 50 is headed: '***Right of access to records of private bodies.'*** Subsection 50(1) states that '*a requester must be given access to any record . . . .*' (Emphasis added.) 'Record' as defined in s 1:

'. . . *means any recorded information –*

(a) regardless of form or medium;

(b) in the possession or under the control of that public or private body, respectively; and

(c) whether or not it was created by that public or private body, respectively.'

Appellant was rightly not content with what SAA said was in their records. His right was to be granted access to the record itself in the form he requested, namely, a computer print-out (see s 54(2)(b) of the Act.) It follows that the appellant should have been granted the relief he sought.

[10] In *MEC for Roads and Public Works* (*supra*) this court expressed the view that where a record of information is requested in terms of s 50 and the State body or private person or institution obdurately and unreasonably refuses to furnish it in circumstances where it obviously should have, the court may make a punitive award of costs to mark its displeasure (paras [20] and [21] of that judgment). The conduct of SAA in this case in my view warrants such an order. Section 9 of the Act states that one of the objects of the Act is:

'(d) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; . . . .'

I emphasize the words 'swiftly' and 'effortlessly'. How did SAA give effect to these objects? From the 25th August 2004 and until he launched the application in February 2005 the appellant by means of 10 e-mail letters requested the information referred to earlier in the judgment. He was variously told in return e-mails by SAA officials that they were unable to furnish the information, that for

security reasons the information could not be given, that the official concerned was on leave and eventually he was told how many passengers went on board in business class and economy class on the particular flight – information which was of no assistance to him. Appellant in an e-mail dated 8th September 2004, in the prescribed form submitted on 21 November 2004 and again in his founding affidavit stated that the information on record he sought was on the computer of Brewis. As stated earlier, this was never disputed by SAA. By the simple expedient of furnishing appellant with the computer print-out this whole issue could have been resolved. Even if SAA's conduct in persistently refusing to make the record available was not intentionally vexatious, it had that effect. (*In Re Alluvial Creek Ltd* 1929 CPD 532 at 535.) As a mark of this court's displeasure at SAA's conduct a punitive costs order will be made in respect of the proceeding in the court below.

[12] The following order is made:

(a) the appeal is upheld with costs;

(b) the order of the court below is set aside and substituted by the following:

'An order is granted in terms of paras 2 and 3 of the Notice of Motion.'

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P C COMBRINCK
ACTING JUDGE OF APPEAL

CONCUR:

MPATI DP
BRAND JA
CLOETE JA
MLAMBO JA