IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG**)**

CCT: 88/07

LAC: JA18/05

SCA CASE NO: 405/07

In the matter between:

EQUITY AVIATION SERVICES (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION First Respondent

W FERREIRA N.O. Second Respondent

NELSON MAWELELE Third Respondent

AFFIDAVIT

I, the undersigned,

PETRUS DU PREEZ

declare under oath:

1 I am an adult male, currently employed by the Applicant as Executive Manager – Organisational Development and Assurance. I am duly authorised to depose to this affidavit.

2 The facts deposed to herein are within my personal knowledge, unless the context indicates to the contrary, and are, to the best of my knowledge and belief, true and correct.

3 This is an application for condonation for the late filing of the record of proceedings. The main application is an application for leave to appeal against a decision of the Labour Appeal Court ("the LAC"). The nature of the application, instituted on 28 November 2007, appears from the founding papers.

4 In terms of directions dated 21 January 2008, the Chief Justice directed the Applicant to file the record of proceedings on or before 21 February 2008. The directions also indicated that the record must consist of the record in the LAC, the application for special leave to appeal to the Supreme Court of Appeal ("the SCA") as well as the application for leave to appeal to the above Honourable Court.

5 For reasons that are set out more fully below, the Applicant was not able to file the record by 21 February 2008. It was on or about 15 February 2008 that it became apparent that the record would probably only be ready by 10 March 2008.

6 In the circumstances, Hofmeyr Herbstein & Gihwala Inc ("Hofmeyrs")., applicant's attorneys of record, sought the consent of the Third Respondent to file the record at that time. I set out these events below but for present purposes point out that Third Respondent was not prepared to consent to an extension of the time period.

7 On 20 February 2008, Adelaide Davids ("Davids") an associate employed by Hofmeyrs sent a fax to the Registrar of the above Honourable Court advising that the record would only be ready by 10 March 2008 and requesting an extension of the time period until that date.

8 After the Third Respondent refused its consent, and on 21 February 2008, Davids sent a further fax to the Registrar of the above Honourable Court dealing with the issues raised by the Third Respondent. I deal with the substance of these faxes below.

9 On or about 29 February 2008, Davids received a facsimile from the Registrar of the above Honourable Court advising that the record must be filed as soon as possible and that a substantive application for condonation for the late filing of the record must be timeously made, which application would be considered on the date on which the application for leave to appeal is to be heard. I annex hereto a copy of the aforesaid facsimile marked "**PP1**".

10 I respectfully submit that Hofmeyrs has diligently sought to obtain the record as soon as possible. I am advised that the record shall be filed by Friday, 7 March 2008 and accordingly the record will be filed 11 (eleven) days late. The

Applicant apologises for the late filing of the record and respectfully requests condonation therefore.

11 I now proceed to explain the reasons for the delay.

12 An initial delay was experienced after the receipt of the directions from the Chief Justice on 21 January 2008. This was because the Applicant was not able to instruct Hofmeyrs regarding the application for leave to appeal, for the following reasons –

12.1 Applicant has – prior to 1 March 2008 – carried on business at various airports situated within South Africa by providing *inter alia* ground handling services to various airlines both international and domestic. Such ground handling services include *inter alia* baggage handling and general aviation logistics support.

12.2 Applicant's right to operate at airports in South Africa has always been dependent on it holding a valid operating license issued by Airports Company South Africa ("ACSA") entitling Applicant *inter alia* to perform ground handling services at the airports which constitutes ACSA property.

12.3 Applicant has always operated under the assumption that its ACSA issued license was valid until at least 2011 provided the license was renewed by Applicant from time to time in accordance with the provisions thereof. In or during 2006, and subsequent to Applicant having sought to renew its operating license, ACSA advised Applicant that the purported renewal of its

license had been defective and that accordingly Applicant's license had expired.

12.4 A dispute accordingly arose between Applicant and ACSA in or during 2007 regarding the renewal of Applicant's operating license and consequent right to operate at ACSA airports. The dispute was arbitrated during 2007. The outcome of the arbitration proceedings was a finding by the arbitrator that Applicant's license had in fact expired in 2006 and there existed no obligation on ACSA to renew such license.

12.5 The arbitrator's finding was subsequently taken on appeal however the appeal tribunal's finding did not differ with the arbitrator's initial finding.

12.6 In or during December 2007 Applicant elected to bring urgent proceedings against ACSA in the Witwatersrand Local Division ("WLD") wherein it sought *inter alia* a review of the appeal tribunal's finding together with a prayer for interim relief aimed at extending its operating license beyond 29 February 2008 until such time as the tender process for the issuing of a third license by ACSA had been completed. ACSA had previously advised Applicant that it would not be permitted to continue operating post 29 February 2008 due to its license having expired in or during 2006.

12.7 I need not point out that the outcome of Applicant's urgent application to the WLD was of crucial importance in determining Applicant's right to continue conducting business at airports in South Africa. It follows that as at 21 January 2008 – the date upon which Applicant received the Chief Justice's

directions to file the record – Applicant's future and continued viability was uncertain to say the least. It was a very real prospect in the event of Applicant's application to the WLD being unsuccessful, Applicant would ultimately cease to exist as a legal entity by virtue of its inability to conduct business.

12.8 As it transpired, Applicant's urgent application was dismissed by the WLD on 1 February 2008. The effect of this on Applicant's business is that it no longer enjoys the right to operate at any ACSA airport situated within South Africa due to the expiry of its operating license on 29 February 2008. Applicant has for all intents and purposes ceased to trade with effect from 29 February 2008.

12.9 To exacerbate matters, South African Airways, formerly Applicant's largest domestic client, cancelled its operating agreement with Applicant with effect from 31 January 2008 which factor contributed further to the uncertainty of Applicant's continued viability as at 21 January 2008. Prior to the cancellation SAA had constituted approximately half of Applicant's business in South Africa.

12.10 Subsequent to Applicant's application to the WLD having been dismissed on 1 February 2008 urgent board meetings took place within Applicant to determine its future. In short, a decision needed to be taken as to whether Applicant would continue to exist as a legal entity in light of the fact that it was no longer entitled to operate at any ACSA airport.

12.11 Following the various board meetings which took place in or during the first week of February 2007, together with various other meetings between Applicant, ACSA and various domestic airlines, a decision was taken by Applicant's board to continue with Applicant due *inter alia* to the prospect of ongoing business in various forms. It was only subsequent to this decision that Applicant was in a position to finally instruct Hofmeyrs to proceed with the instant application and to incur the costs of preparing the record. Applicant's instruction to Hofmeyrs was confirmed on or about 11 February 2008.

12.12 I am advised that Davids immediately attended to make arrangements for the preparation of the record.

12.13 A key obstacle that was encountered was locating a copy of the LAC record. In the ordinary course, if the company that initially prepared a record in earlier proceedings can be engaged, this substantially reduces the time (and cost) involved in preparing a record as the original record would have been retained. This however proved impossible as set out below, with the result that the record of the LAC had to be prepared again and repaginated and several documents forming part of the record had to be retyped. This meant that any transcription company engaged to prepare the record had a more onerous task to complete and a task that would take longer than otherwise would be the case.

12.14 Moreover, although steps were taken to speed up the preparation of the record, it ultimately proved impossible to engage a transcription service to

prepare the record within the time frames available. The best that those involved were able to achieve was to finalise the record for filing by 7 March 2008.

12.15 I now set out the background relating to the above.

12.16 On 12 February 2008, Davids contacted LOM Business Solutions (Pty) Ltd, previously Snellers (Pty) Ltd ("LOM") in order to make enquiries regarding the LAC record to speed up the preparation of the record. In Hofmeyr's experience LOM provides an efficient and reliable service. After making telephonic enquiries, Davids sent a fax to LOM requesting that they confirm that they prepared the record for the LAC and requesting, in the event that they did, that they prepare the record for the above Honourable Court on an urgent basis. I annex hereto a copy of the aforementioned facsimile marked "**PP2**".

12.17 On 13 February 2008, Davids telephoned LOM and spoke to Mrs Schoeman, who ordinarily prepares appeal records. I point out that in view of the fact that LOM had taken over the business of Snellers (Pty) Ltd they were initially unable to confirm or deny that the record had been compiled by them. Davids at that stage did not have a copy of the transcription certificate but after tracking it down confirmed that indeed Snellers had prepared the LAC record.

12.18 On 14 February 2008, Davids addressed a further fax to LOM requesting that LOM attend to preparing the record and to confirm whether a copy of

the LAC record had been located. Davids enclosed the pleadings filed in the SCA under case number 405/07, as well as the pleadings filed in the above Honourable Court. I annex hereto a copy of the letter addressed to LOM marked "**PP3**" wherein Davids requested a reply as a matter of urgency.

12.19 Shortly after the aforementioned letter was received by LOM, Davids received a call from Mrs Schoeman, an employee of LOM, indicating that they do not have the LAC record because Snellers prepared the record copies were not kept when LOM took over Snellers business. Mrs Schoeman further advised that LOM would not be able to assist on an urgent basis as they were already fully booked with other appeal records.

12.20 Davids proceeded to contact President Transcriptions and Recordings ("President"), who, according to Hofmeyr's Sandton offices, are generally able to assist on an urgent basis. Davids was also advised of a transcription service in Durban but due to logistical difficulties and time pressure, decided not to contact them.

12.21 On 15 February 2008, Davids contacted Sheila Khan ("Khan") of President and discussed the urgency of the preparation of record with her. Khan indicated that they would be able to prepare the record for the Applicant but would only be able to furnish same by 10 March 2008.

12.22 Davids immediately instructed President to prepare the record. I refer to the letter annexed as "**PP4**", which is an unsigned copy.

12.23 Davids contacted Mr R Daniels ("Daniels") of Messrs Cheadle Thompson & Haysom, the Third Respondents attorneys of record telephonically on 18, 19 and 20 February 2008, to enquire whether Third Respondent would have any objection to the late filing of the record, but was unable to speak with Daniels and left messages for him. On 20 February 2008, Daniels indicated that Davids should make the request in writing and that he would take instruction from his client.

12.24 Davids accordingly addressed a facsimile, dated 20 February, to Daniels, a copy of which is annexed hereto and marked "**PP5**". As appears therefrom, Davids explained that the transcription agency who prepared the LAC record had been unable to locate the copy and accordingly that that record had to be prepared *de novo.*

12.25 On 20 February 2008, Davids also addressed a facsimile to the Registrar of the above Honourable Court advising that Applicant would only be able to file the record on 10 March 2008 and requested an extension until that date. I annex hereto a copy of the aforementioned facsimile marked "**PP6**". Similarly, Davids explained the need to prepare the LAC record *de novo.*

12.26 Daniels thereafter advised that the Third Respondent is not prepared to consent to the record being filed on 10 March 2008. A copy of the fax is annexed as "**PP7"**. As appears therefrom, the reason for refusing consent was that Third Respondent believed that Applicant had had sufficient time to prepare the record. Third Respondent also advised that in view of the loss of its ACSA licence, it feared that Applicant's business is now

precarious and that delays in the filing of the record could lead to unnecessary delays in the finalisation of the matter which Third Respondent wanted to avoid.

12.27 On 21 February 2008, Hofmeyr addressed a fax to both Daniels and the Registrar of the above Honourable Court responding to the issues raised by Third Respondent. A copy of the facsimile is annexed hereto marked "**PP8"**. Its contents are self explanatory and are in any event dealt with herein.

13 In the premises, I respectfully submit that the Applicant has an acceptable and reasonable explanation as to why the record has been filed late. Hofmeyr has sought to procure a record as expeditiously as possible upon obtaining an instruction to proceed with the matter. The delays were, to a material extent, a result of Hofmeyr not being able to obtain a copy of the LAC record and the constraints of transcription companies.

14 Insofar as the above Honourable Court considers the prospects of success of an application when considering condonation applications, I respectfully submit that the Applicant enjoys reasonable prospects of success. The nature of the application and the essential submissions have been advanced in the application for leave to appeal and will be dealt with more fully in heads of argument to be filed on 13 March 2008. So as not to burden the papers unduly I do not repeat these contentions here, but Applicant's legal representatives will address the court on these aspects at the hearing of the matter.

15 As to the question of prejudice, it is respectfully submitted that Third Respondent shall in no way be prejudiced by the late filing of the record in that third Respondent will have approximately three weeks from the receipt of the record in order to prepare its heads of argument. Moreover in view of the fact that the Third Respondent has been actively involved in the proceedings to date, the fact that the record is received late is unlikely to prejudice its preparation. In any event, the Third Respondent is in possession of all relevant portions of the record from previous proceedings. In any event, a copy of the indexed and paginated record was served on Third Respondent's attorney of record on 6 March 2008.

16 Applicant intends to file its heads of argument timeously and accordingly the delay in filing the record will not cause any delay in finalising the matter.

17 On the other hand, I respectfully submit that the Applicant shall suffer great prejudice should the late filing of the record not be condoned in that Applicant shall be denied a hearing in respect of its application for leave to appeal and shall have incurred the cost of preparing the record unnecessarily. I point out that the cost of preparing the record is R77 000.00.

18 Insofar as the delay may have caused inconvenience to the members of the above Honourable Court, this is sincerely regretted. It is hoped that in view of the fact that the issues that arise in the proceedings are largely legal rather than factual questions, any inconvenience will be less than would otherwise be the case.

19 Finally I point out that the issues raised in this application concern not only an ongoing dispute between the parties as to the amount of back-pay owed to the Third Respondent but also matters of public importance beyond the interests of the current litigants.

20 For all of these reasons, I submit that it is in the interests of justice that condonation be granted and respectfully ask the Court to grant the relief as set out in the notice of motion to which this affidavit is attached.

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PETRUS DU PREEZ

I certify that on the **7th** day of **MARCH 2008** in my presence at **JOHANNESBURG** the Deponent signed this Affidavit and acknowledged that he:

(i) knows and understands the contents thereof;

(ii) has no objection to taking this oath;

(iii) considers this oath to be binding on his conscience and uttered the words, “I swear that the contents of this declaration are true, so help me God”.

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COMMISSIONER OF OATHS