IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: **JR 604/23**

CCMA CASE NUMBER: HO 104-21

In the matter between:

South African Airways (SOC) Limited	**Applicant**
and	
South African Cabin Crew Association obo Members	**First Respondent**
NUMSA obo Members	**Second Respondent**
Commissioner Motlatsi Phala	**Third Respondent**
CCMA	**Fourth Respondent**

Heard : **29 November 2023**

Delivered : **5 January 2024**

JUDGMENT

NORTON AJ

Introduction

1. This case emerges from the business rescue process set in motion in December 2019, to rehabilitate South African Airways ("SAA"). The purpose of this process was to turn around the ailing airline into a potentially commercially viable enterprise. Between the financial years 2015 / 2016 to 2019 / 2020, SAA had made a cumulative loss of R23 billion.[1]

2. SAA was the first state owned entity to be placed in voluntary business rescue. The sole shareholder being the Department of Public Enterprises issued a statement in June 2020 pointing to the demise of the national carrier due to "*corruption, poor leadership and unsustainable costs*." [2]

3. On 30 April 2021 SAA exited business rescue, by which time the number of employees (pilots, cabin crew, ground staff, administrators etc) had reduced from 4700 to 1000; and those remaining, having survived a gruelling section 189A process, were employed on reduced terms and conditions of employment.

4. In August 2021 the South African Cabin Crew Association ("SACCA") and the National Union of Metal Workers of South Africa ("NUMSA") (collectively called the "unions") referred an unfair labour practice ("ULP") dispute to the CCMA alleging unfair treatment of their members by SAA, with respect to promotions, demotions, training and benefits. The unions sought to trigger section 186 (2)(a) of the Labour Relations Act, 1995 (the "LRA"). Noting the centrality of the characterisation of the union's dispute, that section is repeated for convenience:

> "*Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving – (a) unfair conduct by the employer relating to the promotion, demotion, probation…or training of an employee or relating to the provision of benefits to an employee.*"

5. The dispute before the CCMA has never got off the ground, due to a number of factors including; the union's lack of preparation, interlocutory applications pertaining to jurisdiction (with SAA arguing that the underlying facts point to a dispute about a

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[1] Pleadings, Business Rescue Plan, page 237.

[2] Government's preliminary response to the publication of the SAA Business Response Plan, 16 June 2020.

section 189 process, and do not give rise to an arbitrable dispute within the ULP matrix of the LRA), a condonation application by the unions for the late referral of the dispute, and ultimately an application by SAA to dismiss the referral due to a lack of diligent prosecution of the matter.

6. On 28 April 2023 SAA approached the Labour Court on an urgent basis to review three rulings which the CCMA commissioner (the Third Respondent) seized with the dispute had made which went against the entity. Those rulings were:

   6.1. A Jurisdictional Ruling dated 20 March 2022 in which the commissioner found that the CCMA had jurisdiction to arbitrate the ULP dispute; (the "jurisdiction ruling")

   6.2. A Condonation ruling dated 12 October 2022[3] in which the commissioner granted the union condonation for the late referral of their ULP dispute; (the "condonation ruling") and

   6.3. A Dismissal Ruling dated 11 April 2023 in which the commissioner dismissed SAA's application to dismiss the dispute (the "dismissal ruling").

7. When the parties appeared on 18 May 2023 before the Honourable Acting Justice Sethene they agreed to stay the CCMA arbitration pending the determination of the review application, and decided on dates for the exchange of further pleadings. Ultimately the matter was set down on an expedited basis before me on 29 November 2023.

8. In summary SAA seeks an order reviewing and setting aside the three rulings with the following substitutions:

   8.1. Granting SAA's application for the dismissal of the First and Second Respondents' unfair labour practice dispute;

   8.2. Ruling that the CCMA lacks jurisdiction to arbitrate the ULP dispute due to the factual nature of the dispute which lies in a section 189A process;

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[3] The Notice of Motion on pg 5 of the pleadings, referred to the date of 20 March 2022, presumably that was an error as the CCMA ruling on condonation is dated 12 October 2022.

8.3. Ruling that that the CCMA lacks jurisdiction to arbitrate the ULP dispute due to the unions' late referral.

9. In summary the unions seek the dismissal of SAA's expedited review application, and the continuation of the ULP arbitration process before the CCMA.

10. In engagement with the parties it became clear that should I grant just one of the three orders, that would be the end of the union's case before the CCMA.

11. A synopsis of the relevant facts and law pertinent to the expedited application follow.

Chronology of facts

12. In November 2019, the Minister of Public Enterprises announced radical restructuring at SAA, and on 5 December 2019, SAA was placed in Business Rescue.

13. On 18 July 2020 a section 189(3) notice in terms of section 189 and 189A of the LRA was served on the unions by the Business Rescue Practitioners (Siviwe Dongwana and Les Matuson). It was an unusually comprehensive notice (some 30 pages with annexures) and warrants some attention. The practitioners pointed to massive debt, volatile currencies, fluctuating fuel prices, competition in the airline market, lockdown and COVID as reasons for the airline's demise. They wrote,

> *In order to properly respond to the current challenges and to build a commercially viable business going forward SAA proposes a fundamental restructuring of its business, in accordance with the business rescue plan, adopted by the creditors on 14 July 2020. Currently the business is not structured in a manner that can best meet market demand and operate as a sustainable Arican airline*…[4]
>
> *The proposed restructuring will necessitate a reduction in jobs. All jobs are affected. Those positions which will remain in the new structure shall be on materially different terms and conditions (notably in respect of salaries and benefits), while the absence of former positions from the new structure will*

[4] Para 2.2 on pg 243 of the pleadings

mean that those jobs will cease to exist. Every employee will therefore be affected and displaced from their position.[5]

With the exception of Flight Desk Crew, Employees will be selected for positions within the new structure on the basis of the selection criteria…longest service subject to skills, qualifications and experience…taking into account employment equity objectives.[6]

Of the current 4661 jobs, 1000 will exist in the restructured organisation either on different terms and conditions to those currently existing, or as new jobs created by the restructuring which do not currently exist. All existing terms and conditions of employment (including collective agreements), of any nature, will be terminated and new terms and conditions of employment will be negotiated and aligned with market related terms and conditions of employment.[7]

14. In a section entitled "*Alternative terms and conditions of employment for remaining employees*", the notice read,

During the consultation process, and as part of the measures aimed at minimising the retrenchments of SAA employees, SAA will request that the parties conclude a collective agreement, in terms of which the existing collective agreements will be terminated to cater for the new terms and conditions of employment, which will pave the way for a viable and sustainable SAA…[8]

In the event that parties are unable to conclude such collective agreements, then SAA would have to consider operationally terminating all its remaining employees and seek to obtain alternative employees who are prepared to be employed on the terms and conditions of employment that are operationally required."[9]

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[5] Paragraph 2.4

[6] Paragraph 2.5

[7] Paragraphs 2.6 and 2.7

[8] Paragraph 4.1 on page 247

[9] Paragraph 4.5 on page 247

15. The business practitioners in their notice therefore drew explicit attention to the financial crisis of SAA, anticipated large scale reduction of jobs, new terms and conditions of employment for those remaining staff and new collective agreements with unions (failing which, retrenchments were to follow).

16. Between 11 August 2020 to 3 October 2020, the CCMA conducted 8 consultations with the unions as well as the Aviation Union of South Africa ("AUSA"), the National Transport Movement ("NTM"), Solidarity and the South African Transport and Allied Workers Union ("SATAWU").

17. On 4 November 2020, SAA sent a letter to all consulting parties, to say that the S 189 A consultation process had closed, and that SAA would commence with the population of a new organisational structure.

18. SAA negotiated new collective agreements on new terms and conditions of employment with - AUSA, NTM, Solidarity, SATAWU and two non-unionised groups elected to represent other employees - but not the unions subject to the dispute before the CCMA and this honourable court (ie SACCA and NUMSA).

19. With little co-operation from SACCA and NUMSA, SAA began to engage with the members directly. This was resisted by those unions. SAA sent letters dated between December 2020 to February 2021, to members which read,

> *"Dear X:*
>
> *Feedback of placement as part of the S189 Restructure process: The outcome of the placement panel, after applying the LIFO principle that was consulted on during the S 189 process is as follows. We are pleased to advise you that you have been selected for placement as a CSA Trade Support, Job Level G2 and your appointment date is 1 January 2021. Your CTC will be R 337,452.00…Your appointment is conditional upon you signing your acceptance of new terms and conditions of employment, and new remuneration*…"

20. Attorneys for the unions (Minnaar Niehaus Attorneys) argued that SAA's actions were tantamount to a violation of section 187 (1)(c) in that should the members refuse to

accept changed terms and conditions of employment, their rejection would trigger automatically unfair dismissals. [10]

21. SAA's attorneys (ENSAfrica) responded later, disputing the analysis presented and confirming their view that it was well understood that dismissals were likely to arise from the S189 A process, and that those who secured alternative placements would do so as an alternative to retrenchment and at new terms and conditions of employment. Automatically unfair dismissals would therefore not arise.[11] ENSAfrica informed Mr Niehaus that none of his clients were compelled to agree to any new terms and conditions. In circumstances in which alternatives were proposed but not accepted by the members retrenchment would arise.[12]

22. In January 2021 SAA made their position abundantly clear when members began accepting the offers, but claiming they were doing so under duress.[13] SAA wrote (by way of example),

> *We refer to your email response in which you indicated that you had accepted the Company's offer of a new position, on new terms and conditions of employment under duress and for fear of retrenchment.*
>
> *Unfortunately, this does not constitute an acceptance of the offer. In the event that you would like to accept the new position, on the new terms and conditions of employment, without any reservation of rights, you are required to revert to the Company, confirming that you accept the new terms and conditions of employment unconditionally.*
>
> *We remind you that this offer has been made to you pursuant to a facilitated consultation process involving the restructuring of the Company and proposed retrenchments in terms of the provisions of section 189A of the Labour Relations Act which involved all representative trade unions over many months. It is made in an effort to avoid compulsory retrenchments and the*

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[10] Correspondence from Minnaar Niehaus Attorneys to Edward Nathan Sonnenbergs Inc, dated 2 December 2020, pg 796.

[11] Correspondence from ENSAfrica to Minnaar Niehaus Attorneys, 4 December 2020, pg 800

[12] Record, pg 104.

[13] SAA Letter to GK dated 8 January 2021

suggestion in these circumstances that the offer is accepted under duress is rejected.

Kindly let us have your response by no later than Monday, 11 January 2021, close of business by sending your response to isops@flysaa.com. If you fail to unconditionally accept the offer by such a date, it will be made to another employee. If the retrenchment avoidance measures are unsuccessful (i.e re-matching and the TERS (TLS), you may be retrenched.

23. Between January 2021 to May 2021, SAA implemented the reorganisation of the organogram, basically matching employees to positions under new terms and conditions. Those who could not be accommodated were retrenched.

24. On 30 April 2021, SAA exited Business Rescue.

25. On 11 August 2021 the unions referred an ULP dispute to the CCMA with respect to promotions, demotions, training and benefits arising from the S 189A process. In the 7.11 referral form the unions wrote that the dispute arose on 28 July 2021. Nowhere in the papers before me was there an explanation for this date.

26. The unions described the dispute as follows:

"*NUMSA/SACCA on its interest and on behalf of their members adversely affected (*by*) an unfair labour practice dispute in relation to demotions/promotions to the CCMA in respect of the arbitrariness and unfairness perpetrated by SAA in respect of the placement of employees in its new structures pursuant to the section 189A process*

The aforesaid dispute will include those employees who find themselves as a result of the irrational and unfair placement process, without positions and who will as a consequence be placed by SAA in a non-existent Training Lay Off Scheme.

As far as changes in remuneration and conditions of service is concerned, it is confirmed that NUMSA / SACCA have not agreed to such changes…"[14]

[14] Record pg 6

27. The parties attended conciliation on 4 October 2021, but the dispute remained unresolved and the unions referred the dispute to arbitration on 14 October 2021.

28. The dispute was first set down for 23 November 2021 (the "first" set down). The CCMA commissioner instructed the parties to conclude a pre arbitration minute by 30 November 2021. As *dominus litus* the unions should have arranged a pre arbitration conference as contemplated in Rule 20 of the CCMA Rules at least 14 days before the set down, but they did not do so.

29. SAA's attorneys prepared the first draft and sent the proposed minutes to the unions' attorneys, but they were not finalised by them. The 30 November 2021 came and went, and no minute was filed with the CCMA.

30. The CCMA proceeded to set the matter down for 24 February 2022 (the "second" set down).

31. On 10 February 2022 SAA sought to challenge the jurisdiction of the CCMA to entertain the ULP dispute arguing that the underlying nature of the dispute arose out of the S 189A process and any challenge to that process lay at the door of the Labour Court. In the alternative SAA argued that the union's members had agreed to the changing terms and conditions for continued employment, or to participate in the training scheme, and therefore there was no cognisable dispute between the parties.

32. The attorney for the unions sought a postponement of the set down for the 24 February because he had another engagement for Eskom. SAA obliged.

33. On 20 March 2022 Commissioner Motlatsi Phala (the Third Respondent) ruled on the jurisdiction challenge, finding that that the CCMA had jurisdiction to arbitrate the dispute.

34. The commissioner concluded

> "*I appreciate the description above, however a 7.11 referral form does not constitute pleadings. As a result it is difficult to conclude simply on the basis of that categorisation that this constitutes the actual case of the applicants. More is required by way of evidence to come to that conclusion*."

35. The CCMA rescheduled the arbitration for the 20 June 2022 (the "third" set down). SAA's attorneys attempted to gain some traction on the outstanding pre arbitration minute and engaged with the unions' attorney (Mr Niehaus). Mr Niehaus proposed

that the parties await the arbitration at the CCMA and conclude that process there. He said that he was awaiting instructions from his client on the proposed pre arbitration minute.

36. At the CCMA on the 20 June the parties agreed to proceed by way of a statement of case (unions) and a reply (SAA), and that those pleadings would be used to conclude the pre arbitration minute. The arbitration was rescheduled to 29 and 30 August 2022 (the “fourth” set down).

37. The pleadings were exchanged, but the unions failed to make any traction on the pre arbitration minute. Mr Niehaus, explained that he was travelling in Europe and could not attend to the matter.

38. Later at the CCMA Mr Niehaus stated that a condonation application was required for the union’s late referral of the ULP dispute. The arbitration did not / could not proceed as scheduled.

39. On 12 October 2022, the CCMA granted condonation for the late referral.

40. With agreement between the parties, the CCMA set the matter down for arbitration on the 13 and 14 December 2022 (the “fifth” set down). Days before, SAA’s attorneys engaged with Mr Niehaus about the outstanding issue of the pre arbitration minute.

41. At the CCMA Niehaus voiced his view that the statement of case and reply had overtaken the need for a pre arbitration minute. The CCMA commissioner disagreed and on the 13 December ordered the parties to conclude the minute by close of business on 14 December 2022. The arbitration was rescheduled from 27 to 30 March 2023 (the “sixth” set down).

42. The minute was not complete and Mr Niehaus requested an indulgence from the CCMA as he could not obtain instructions on aspects of the draft minute. Later Mr Niehaus reverted with a revised pre arb minute, but it was unsigned. The minutes were acceptable to SAA, and SAA informed him as such, requesting him to sign the minutes, after which they would.

43. In January 2023 Mr Niehaus contacted ENSAfrica explaining that he could not sign the minutes as he was awaiting documents constituting their bundle from his clients. The union’s bundle was due 31 January 2023; and SAA’s some 10 days later.

44. By the 2 March 2023, the unions had not signed the pre arb minute, nor delivered their bundle of documents. SAA sought to have the case dismissed for lack of diligent prosecution.

45. On 20 March 2023, the unions responded conceding that:

45.1. SAA had reason to complain;

45.2. They needed a further indulgence from the CCMA to prosecute the case to conclusion;

45.3. They were giving conflicting instructions to their attorneys; and

45.4. They were having organisational difficulties preparing for the case.

46. The unions explained that they were challenged by the request by SAA to provide a schedule with the names of individual members who allege that they were subjected to ULPs, detailing the nature of the ULP suffered and the relief sought.

47. The union sought to gain greater clarity from their members about the nature of the ULP experienced and prepared a standard form in which they elicited the following type of questions:

> *Did you sign the Conditions of Employment and / or the Temporary Layoff Scheme agreement under duress?*
>
> *Were you demoted?*
>
> *Were you promoted?*
>
> *Did you agree to the total cost to company process?*
>
> *Which of the following benefits were decreased or taken away? Medical aid?13th cheque? Housing allowance? Meal allowance? Shift allowance? etc*

48. A cursory read through the responses on the forms made on 14 March 2023 indicates varied situations: For example Employee TM[15] indicates that he did not sign

[15] Record pg 1085

any new conditions of employment under duress; Employee HT[16] indicates that he was not demoted; Employee JCH[17] indicates that his salary did not decrease by 35% but that his annual leave days decreased; Employee NH indicates that he did not sign any new conditions of employment under duress and that the company's medical aid and pension contribution decreased.

49. It would appear at this late stage that the union was attempting to get to grips with what their case was supposed to be – some 19 months after they had referred the ULP dispute.

50. On 11 April 2023, the CCMA commissioner dismissed the dismissal application. Having essentially replicated the arguments presented by both parties, the commissioner opined that "*this is not a run of the mill case*", and that a CCMA commissioner did not have the power to dismiss a dispute before hearing the merits. He concluded with,

> "*The CCMA is a creature of statute and has no inherent powers in the absence of any section in the act empowering a CCMA commissioner to dismiss a case prior to the actual merits being ventilated, my hands are tied*."

51. By 26 April 2023, the union had still not signed the pre arbitration minute, nor presented their bundle of documents, and SAA approached this honourable court for an order in summary

    51.1. reviewing the commissioner's ruling of 23 April 2023, and granting SAA's application to dismiss,

    51.2. reviewing the jurisdictional ruling and substituting it with a ruling that the CCMA lacks jurisdiction to arbitrate the ULP, and

    51.3. reviewing the condonation ruling in favour of the union and substituting that ruling with an order dismissing the condonation application.

52. On the 18 May 2023, the parties agreed that they would jointly approach the Judge President for an expedited hearing of the review application This agreement was

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[16] Record pg 1086

[17] Record pg 1087

made an order of court by the Honourable Acting Judge Sethene. The parties agreed to stay the arbitration for a period of 60 days pending the outcome of the review.

53. The matter was ultimately set down on 29 November 2023. The arbitration did not take place after 60 days, presumably the parties await the outcome of this application before me.

The Application to dismiss

54. When SAA made the application to dismiss at the CCMA on 2 March 2023, the entity drew attention to the following facts:

    54.1. The failure of the unions to sign the pre arbitration agreement since November 2021[18];

    54.2. The unavailability of the union's legal representative.[19]

    54.3. After some 1.5 years since the referral the parties were not in a position to proceed, by implication because of the union's dilatory approach to the matter.[20]

55. The unions replied that SAA had reason to complain, that they required a further indulgence from the CCMA to prosecute the claim, and that they had capacity challenges.[21]

56. Legally speaking SAA drew the following to the commissioner's attention:

    56.1. Commissioners are enjoined to resolve disputes '*fairly and quickly*" according to section 138(1); and

    56.2. The commissioner had the power to grant the order sought, that power sourced implicitly from section 138(9)(b) of the LRA, read with section 1(d) of the LRA which promotes the effective resolution of labour disputes.

57. The commissioner concluded as follows on 11 April 2023:

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[18] Pleadings pg 1025

[19] Pg 1030

[20] Pg 1143.

[21] Answering affidavit, pg 1078

57.1. There is nothing in the sections referred to giving a CCMA Commissioner authority to dismiss a dispute for whatever reason before the matter is heard on the merits.

57.2. Section 138(5) refers to situations in which a commissioner may dismiss a case but *Solomons v CCMA*[22] and others changed all that.

57.3. The CCMA is a creature of statute and has no such power, in the absence of any section in the Act empowering a CCMA commissioner to dismiss a case prior to the actual merits being ventilated.

57.4. The application is dismissed.[23]

58. On 28 April 2023, SAA approached the Labour Court on an urgent basis seeking an order to review and set aside SAAs application to dismiss (amongst other orders).[24] Lourens Erasmus, the Senior Manager: Rewards, Recognition and Human Resources Services, was the deponent to SAA's review application. He begins SAA's motivation for the review with,

> "*This review is brought out of a deep sense of frustration and despair on the part of SAA that the dispute resolution process at the CCMA has been substantially abused by the Unions. SAA's constitutional and statutory rights to a fair procedure and its right to the determination of disputes fairly and quickly as contemplated by section 138(1) of the LRA, have been seriously infringed*."[25]

59. SAA argued that arbitrations conducted by the CCMA should be determined fairly and quickly as required by section 138(1) of the LRA. Furthermore that the resolution of disputes should be "effective" as per one of the purposes in the LRA contemplated in section 1 (d)(iv). A commissioner is entitled to make an award "*that gives effect to the primary provisions and objects of the LRA*."[26]

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[22] JR 99 /2021 dated 4 August 2021

[23] Pg 1177 and 1178

[24] Pleadings, pg 2

[25] Para 9

[26] S 138 (9((b)

60. The SAA pointed to jurisprudence from civil courts which accept that an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process warranting the dismissal of the claim. SAA's Heads of Argument referred to the Supreme Court of Appeal's decision in *Cassimjee V Minister of Finance*[27] which held:

> *"… there are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable; and third, the defendant must be seriously prejudiced thereby. Ultimately, the enquiry will involve a close and careful examination of all the relevant circumstances, including the period of delay, the reasons therefore and the prejudice, if any, caused to the defendant…*"

61. The Constitutional Court has acknowledged that inordinate delays in litigating damage the interests of justice given that

> "*they protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily a case that has gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared*…"[28]

62. Rule 11 of the Labour Court rules is the usual procedural mechanism used to dismiss a matter due to the dilatory conduct of the applicant. A party may be barred from pursuing their case because –

    62.1. An unreasonable delay may cause prejudice to the other parties;

    62.2. An unreasonable delay will undermine a primary objective of the LRA being the expeditious resolution of labour disputes; and

    62.3. It is both desirable and important that finality be reached within a reasonable time.

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[27] 2014 93) SA 198 (SCA) at paras 10 and 11

[28] Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) at para 11.

63. By failing to apply the principles outlined above, SAA submitted that the Commissioner committed an error in law which rendered the Dismissal Ruling susceptible to review. SAA argued that the commissioner's powers are wide enough to deal with any abuse of the CCMA arbitration process, and was not constrained to the merits of the dispute before it could be dismissed in every circumstance. Furthermore the commissioner's reliance on the *Solomon's* case was clearly wrong as the facts were materially different and in any event that judgment had been qualified by the LAC in the *Mohube v CCMA and others*[29] matter.

64. SAA concluded in it's heads of argument that the commissioner's analysis that he could not dismiss the matter before hearing the merits of the matter was "*patently inconsistent with the law, rendering the Dismissal Ruling reviewable*."

65. At the proceedings in the expedited application in 2023, SAA referred to the case of *Ferreira v Tyre Manufacturers Bargaining Council & Others*[30] in which the Labour Court held that a commissioner does have the power to dismiss a matter referred to arbitration in cases where there is an inordinate delay because this is reasonably incidental to a commissioner's power to make an award which gives effect to one of the primary objects of the LRA.

66. The unions in contrast argued that section 158 (1B) of the LRA prohibits parties from proceeding to the Labour Court for relief in circumstances in which an internal workplace hearing or CCMA or Bargaining Council process was incomplete.[31]

67. Section 158(1B) of the LRA states that:

> *"The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the commission or any Bargaining Council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the Bargaining Council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined."*

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[29] (2023) 44 ILJ 1683 (LAC)

[30] (2013) 34 ILJ 364 (LC) at para 21

[31] Paragraph 8 onwards to the union's Heads of Argument.

68. The unions referred to the case of *Ngobeni v Prasa Cres and others*[32] in which the Labour Court dismissed an urgent application to postpone a disciplinary hearing pending a review of a presiding officer's points *in limine* rulings (relating to bias and recusal). The court explained why it should be slow to intervene in incomplete arbitration proceedings: the first reason is policy related in that intervention would undermine the informal nature of the system of dispute resolution; the second reason is that reviews on a piecemeal basis would frustrate the expeditious resolution of labour disputes. The court referred to the case *Trustees for the time being of the Bioinformatics Network Trust v Jacobson and others*[33] and its conclusion that "…*justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run the course without intervention by this court*."[34]

69. Furthermore the unions argued that "*the attempt by SAA to have the referral dismissed is self evidently opportunistic and quite unjustified*." The unions said that SAA "*is equally to blame*" for the struggle to finalise the pre arbitration minute. The unions point to SAA's insistence that they prepare a schedule of individual members who allege that they were subject to an unfair labour practice detailing the nature of the ULP suffered and the relief sought. The unions argue that this requirement was one of the key reasons for the delay in concluding the pre arbitration minute.

70. The unions concluded with "*SAA would have been well-served to follow the peremptory provisions of the LRA and to seek a review of the mentioned rulings after the conclusion of the arbitration process and after an award was issued*".

The application to review the jurisdictional ruling

71. On 24 February 2022 SAA launched an application in the CCMA for an order (amongst others) declaring that there was no cognisable unfair labour practice dispute in terms of section 186 (2) (a) of the LRA noting that the conduct complained about relates to section 189A (selection criteria or alternatives to retrenchment); alternatively the members agreed to the new terms and conditions, or agreed to voluntarily participate in a training and lay off scheme.

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[32] [2016] 8 BLLR 799 (LC)

[33] [2009] 8 BLLR 833 (LC)

[34] Para 13

72. SAA argued that the CCMA does not have general unfairness jurisdiction. Applicants referring an unfair labour practice dispute must therefore demonstrate that the dispute falls within that section. The scope of the types of conduct that could give rise to an unfair labour practice are specifically limited by section 186(2) of the LRA. Therefore, in order to have a cognisable claim under the section, the conduct complained of by the unions must involve one of the practices specified in paragraphs 186(2)(a) to (d) of the definition of “unfair labour practice”. Put differently, if the unions could not bring their complaint within one of the specific categories provided for in the definition set out in section186(2), they could not pursue an unfair labour practice dispute in the CCMA.

73. An unfair labour practice has three key elements.

    73.1. The first element that must be established, is an unfair act or omission, that arises between an employer and an employee. The applicant in a dispute bears the onus of establishing this unfair act or omission.

    73.2. The second element that must be established is that the employer must actually have done something the employees claim it should not have done, or refrained from doing (or refused to do) something the employees claim it should have done.

    73.3. The third element is unfairness by the employer relating to promotion, demotion or the provision of benefits. Unfairness in this context is evidenced by arbitrary or capricious conduct on the part of the employer.

74. SAA argued that drawing from the above, in order to assess whether the dispute referred by the unions is, properly construed, one related to an unfair labour practice, it is essential that one identify the unfair act or omission that forms the underlying subject-matter of the dispute.

75. A starting point is the unions’ referral form, which self-evidently indicated that the gravamen of the dispute was the section 189A process. To the extent that the unions or the individual members were aggrieved by the application of selection criteria pursuant to the section 189A process, they ought to have exercised their rights in terms of sections 189A(13) to approach the Labour Court for appropriate relief. This they failed to do.

76. As such, SAA contends that the CCMA does not have the necessary jurisdiction to determine the alleged unfair labour practice dispute referred by the unions given that, on the unions own articulation of the dispute, is a challenge to the outcome of the section 189A process.

77. SAA went further and pointed to the fact that:

77.1. 171 NUMSA and 172 SACCA members unequivocally accepted SAA's new structure and new terms and conditions of employment.

77.2. 178 of the union members voluntarily elected to participate in the training and lay off scheme, and attached a list of names as proof.

78. SAA submitted to the commissioner voluminous evidence of this acceptance, totally approximately 450 pages of signed letters and forms to that effect.

79. The unions (deponent being Viwe James from NUMSA) argued as follows:

79.1. The application was "*patently opportunistic and disingenuous*"[35]

79.2. SAA had previously raised an objection to the CCMAs jurisdiction during the condonation process, and that application was dismissed by Commissioner Boitumelo Mokoena on 30 September 2021. [36]

79.3. SAA acted in an arbitrary and unfair manner and the union's members were severely prejudiced, and that oral testimony was required to ventilate the issues. [37]

80. Commissioner Motlatsi Phala on 20 March 2022 made his ruling that the union's 7.11 description of their case

> *"did not constitute pleadings (and)…As a result, it is difficult to conclude simply on that categorization that this constitutes the actual case of the*

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[35] Para 4, page 885

[36] Para 10 page 886

[37] Para 23 and 24, page 889

*applicants (*ie the unions*). More is required by way of evidence to come to that conclusion…The CCMA has jurisdiction to arbitrate the dispute*"[38]

81. In the urgent application to the Labour Court, SAA states that it was incorrect to conclude that the CCMA had jurisdiction to deal with the matter. SAA challenged the unions to demonstrate that their dispute fell within the umbrella of section 186(2)(a) of the LRA, and they failed to do so. SAA submitted that the commissioner committed an error in law and impermissibly assumed jurisdiction to arbitrate the ULP dispute against SAA.

Discussion and Analysis: the Application to dismiss

82. Despite the union's protestations, the delay in proceeding with the arbitration rests almost entirely at their door. Their attorney has sought postponements (twice), the union has failed to sign the pre arbitration minute which the parties have in principle agreed to, they are unable to serve a bundle of documents for use in the arbitration, they made an attempt as late as March 2023 to obtain instructions from members on the nature of the ULP which they referred in August 2021, and they admit to organisational difficulties and the inability of their members to provide clear instructions on the matter. Simply put the unions are fundamentally unprepared to proceed with an arbitration before the CCMA. At least 6 set downs have come and gone over approximately 19 months with no meaningful traction of the dispute. They are *dominus litus* but are incapable of pursuing their own case.

83. The section 158 (1B) point made by the unions is noted, and would ordinarily have merit, except that when one considers the facts of this case it is more arguable than not that it would be just and equitable to review the commissioner's decision not to dismiss the matter. In *Ntombela & others v United National Transport Union & others*[39] the Labour Court upheld the principle that it could review a ruling before the finalisation of arbitration proceedings at the CCMA if it was "just and equitable" to do so.[40] The *Ngobeni* case which the unions rely on for its argument that the Labour Court should not intervene before an arbitration is complete is factually

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[38] Paragraphs 3.106 on page 922.

[39] (2019) 40 ILJ 874 (LC)

[40] In this case the issue before the Labour Court was whether a commissioner was *functus officio,* having ruled that in March 2018 that the CCMA did not have jurisdiction to hear an ULP brought by UNTU, but some 4 months later deciding that the CCMA did. See paragraph 42

distinguishable. In that case the employee sought the court's intervention on spurious grounds – for example that the presiding officer was biased because he was paid by the employer to chair the enquiry. SAA's case in contrast has merit.

84. The Labour Court decision in *Ferreira v Tyre Manufacturers Bargaining Council and others*[41] is instructive of the matter. In this case the Labour Court held that arbitrators in bargaining councils and the CCMA have the power to dismiss an application on the grounds of undue delay or dilatoriness. Lagrange J makes the point that bargaining councils perform a quasi judicial statutory dispute resolution function and exercise no inherent jurisdiction like a court. Their powers must be sourced from the governing statutes. The principle of legality requires that public power can be validly exercised if it is sourced in law. There is such law in the LRA.

85. The power to dismiss arises from sections 138(1) and 138 (9)(b) of the LRA. Section 138(1) refers to the obligation on the commissioner to determine the dispute "*fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities*." Section 138(9) (b) enjoins a commissioner to make an award "*that gives effect to the provisions and primary objects of this Act.*" One of the primary objects of the LRA set out in section 1(d)(iv) is the "*effective resolution of labour disputes'*. One of the characteristics of effectiveness, is that of "*expeditious*".

86. Lagrange J concludes,

> *"It follows in my view that a party that is dilatory in exercising its rights under the Act may, in cases of unjustified delay, thwart the aim of an expeditious dispute resolution process, and can be prevented from dragging a matter out indefinitely by its own inaction. I believe that it is clear also that an arbitrator does have the power to dismiss a matter referred to arbitration in such cases, because this is reasonably incidental to a commissioner's power to make an award which gives effect to one of the primary objects of the Act*."[42]

87. On a final note, and for reasons of completion, the commissioner committed a material error of law when he sought to justify his decision not to dismiss the union's referral by referring to the *Solomon* case. This was an error of law, not only because

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[41] [2012] JOL 29380 (LC)

[42] Para 21

the Labour Appeal Court had corrected the Labour Court's interpretation of section 138 (5)(a)[43], but the reference to the section and the issue in dispute about an applicant who failed to attend an arbitration, was irrelevant to the issue before him.

88. In summary, I am of the view that the commissioner committed a material error of law when he held that he did not have the power to dismiss the matter. Sections 138(1) and (9) read with section 1(d)(iv) gives him that power. *Ferreira* was the precedent setting case clarifying the legal position. His inadvertent reliance on *Solomons* was clearly misplaced. All in all he should have exercised the power that he had, in favour of SAA, noting the duration of the union's delay, their lack of diligent preparation for the case, and the prejudice that SAA suffered preparing repeatedly for an arbitration (six set downs over 19 months) which failed to "fly".

Discussion and analysis: CCMA lacks jurisdiction as the dispute does not constitute an ULP

89. It is trite that the CCMA is a creature of statute and is not a court of law, and as a general rule, cannot decide its own jurisdiction. It can only make a ruling for convenience.[44]

90. SAA has challenged the CCMA's jurisdiction to arbitrate the alleged ULP dispute on three grounds, firstly that the genesis of the dispute pertains to the S 189 A process, and any procedural or substantive complaint should be heard by the Labour Court; secondly that the union members accepted their new terms and conditions of employment, and thirdly the union members accepted their placement in the Training and Layoff Scheme. By inference the logical conclusion of those acceptances disqualify the members from now complaining that SAA has committed an ULP with respect to demotions, benefits and training. [45]

91. The unions in their 7.11 referral, locate the ULP dispute in the retrenchment process. Properly considered the complaint about promotion, demotion, training and benefits, arising from the section 189A process, is a complaint about SAAs means to avoid dismissals and to mitigate the effects of anticipated dismissals. The CCMA has no jurisdiction over such a complaint. The unions have impermissibly morphed a dispute

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[43] Mohube v CCMA and Others (2023) 44 ILJ 1683 (LAC)

[44] SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others

[45] Paragraph 13,2; 13.3; 13.4, pg 737 of the record,

about the retrenchment process arising from section 189A into an ULP dispute to bring their dissatisfaction within the jurisdiction of the CCMA. The commissioner should have been alive to this and should have found that he had no jurisdiction to arbitrate the alleged ULP dispute, which had at it's core, a challenge to section 189A, and not opportunistically section 186(2)(a). In *Telkom SA Ltd v CCMA*[46] the Labour Court held that an employee aggrieved by restructuring must challenge that as part of the s 189 process and may not proceed by way of an ULP. The commissioner had misconceived the nature of the enquiry and had no jurisdiction to entertain the dispute.

92. On the unions' articulation of the dispute before the CCMA, SAA acted in an arbitrary and unfair manner in placing employees in its new structure pursuant to the section 189A process. However, the unions ignore the fundamental point that their members have agreed to new terms and conditions, alternatively to the training and lay off scheme. SAA was clear that if there was no voluntary agreement, regrettably retrenchment would be the logical outcome. In light of such acceptances, there cannot be any suggestion that, in implementing these agreements, SAA did something the individual members claim it should not have done. There is a glaringly obvious lack of unfairness, arbitrariness or capriciousness on the part of SAA.

93. The members were well aware that SAA was in financial crisis, that a business rescue process was set in motion to attempt to save the entity, that the CCMA had been brought in to manage and lead the section 189A process, and that there would be a new organisational structure with only 1000 positions available at different and diminished terms and conditions of employment.

94. It wasn't for the unions and their members to accept the new terms and conditions of employment to save their employment; and then to make an about turn and dispute the very terms and conditions under which they were employed by referring an ULP dispute. The unions were seeking to have their proverbial cake and to eat it.

95. SAA, in their founding affidavit to the CCMA, challenged the unions to demonstrate that the dispute before the CCMA was a genuine unfair labour practice complaint. The unions simply do not engage with the submissions made by SAA in any

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[46] (2019) 40 ILJ 1093 (LC)

meaningful way. Viwe James, a NUMSA official and deponent to the answering affidavit, avoids the heart of SAA's contention which is that, the union's members were not subject to an ULP dispute as they agreed to the revised terms and conditions of employment as a means to avoid retrenchment, as part and parcel of the S 189A process.

96. It is not helpful to an argument to discredit the other side's pleadings as "*disingenuous"*, "*not in the interests of justice*", "*untenable*", and "*simply wrong*" without laying a proper factual and legal foundation for these views. The union submits that "*verbal testimony and proper cross examination (*is required*) in order to expose the Respondent's failure and the unfairness with which it had treated employees*."[47] James writes *"As such the applicants* (ie the unions*) will refrain from engaging with the respondent (*ie SAA*) in factual disputes and reserve the right to deal with such disputes during the conduct of the arbitration process and as such a failure to deal with each and every allegation contained in the founding affidavit ought not to be construed as an acceptance of the correctness of same*."[48]

97. According to the Labour Court decision in *SA Post Office Ltd v CCMA*[49] only once an employee has established a right does the commissioner have the jurisdiction to entertain the dispute. In *SA Post Office* the employee could not establish that he had a right to an acting allowance (as a benefit), the dispute did not therefore constitute an arbitrable dispute of right, and it followed that the CCMA had no jurisdiction to entertain the alleged unfair labour practice dispute.

98. The point is that the applicant must establish the right to satisfy the requirements for jurisdiction. The unions, when challenged to establish the right that factually their members had a dispute about promotions, demotions, benefits and training, could not do so. That should have been sufficient for the commissioner to find in SAA's favour that the CCMA had no jurisdiction to entertain the alleged ULP dispute as the unions had failed to factually lay a basis for such a claim.

99. But it gets worse for the unions and the commissioner - SAA had established a *prima facie* case, based on some 450 pages of evidence, that the members had consented

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[47] Para 25, pg 880.

[48] Para 30, pg 890.

[49] (2012) 33 ILJ 2970 (LC)

to the new terms and conditions of employment, or had consented to the offer and the conditions related to training. There simply was no legitimate dispute before the commissioner, and he failed to apply his mind to the overwhelming factors in SAA's favour that there was no cognisable ULP claim before him. Commissioner Phala largely replicated the submissions in the affidavits presented by the parties for some 18 pages, and then without interrogating the submissions made, or considering the relevant legal principles, concluded that he has jurisdiction to arbitrate the matter.

100. When such a ruling is challenged on review, as is in this case, the test is not whether the commissioner's assumption of jurisdiction was reasonable but whether the finding on jurisdiction was correct. An application of this test requires a consideration of whether the Commissioner objectively had jurisdiction in law and fact. I submit that he did not, noting that the nature of the complaint had its genesis in a section 189A dispute (and not section 186(2)(a), and that the facts pointed to a voluntary agreement between the parties regarding new terms and conditions of employment and therefore an ULP dispute did not arise. If he had any doubt about the matter, he should have been persuaded that the unions had no case, as when challenged to "show their hand" could not do so.

Conclusion

101. The commissioner committed a material error of law when he found that he had no power to dismiss the union's referral without hearing the merits in a fully fledged arbitration. He had such power. Sections 138(1) and 138(9)(b) read with section 1(d)(iv) of the LRA gives him that power. *Ferreira* was the precedent setting case clarifying the legal position. Noting the extensive delay in proceeding with the matter, the poor preparation by the union, and the prejudice to SAA, he should have found that SAA had laid a factual basis for the dismissal of the unions' claim, and furthermore that he had the power to do so.

102. The commissioner committed a material error of law when he found that he had jurisdiction to arbitrate the unfair labour practice dispute. The underlying dispute arose from the section 189A process, and factually speaking the unions' members had agreed to revised terms and conditions of employment to stave off retrenchments, or had agreed to the conditions of the training and lay off program. When challenged by SAA to set out the factual basis of their complaint, they chose not to do so, leaving unanswered overwhelming evidence of consent by their

members. Simply put, there was no cognisable ULP dispute before the CCMA. The CCMA has no jurisdiction to arbitrate the dispute.

Costs

103. The general principle in labour matters is that costs do not follow the result. Cost orders are not made unless the requirements of law and fairness are met.[50] In my view this is a case where the unions should be saddled with costs as contemplated in section 162(2)(b) of the LRA. They have pursued this dispute unclear about the facts of their case, they have been dilatory, and largely responsible for repeated delays at the CCMA. Legally speaking their referral was opportunistic and utterly misconceived.

Order

104. I make the following order:

104.1. The ruling of the third respondent under case number HO104-21 dated 11 April 2023 is reviewed and set aside.

104.2. SAA's application for the dismissal of the unfair labour practice dispute succeeds.

104.3. The ruling of the third respondent under case number HO104-21 dated 12 October 2022 that the CCMA had jurisdiction to arbitrate the dispute is reviewed and set aside.

104.4. The CCMA has no jurisdiction to arbitrate the unfair labour practice dispute made by the unions in August 2021.

104.5. The unions are to pay SAA's costs, limited to one counsel.

[redacted]

[50] *Zungu v Premier of the Province of KwaZulu-Natal* (2018) 39 ILJ 523 (CC)

D Norton

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant	: Adv Redding SC and Adv Mndebele
Instructed by:	Edward Nathan Sonnenbergs Incorporated
For the Respondent	: Adv Bekker
Instructed by	: Serfontein, Viljoen and Swart Attorneys