

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: **J 604/23**

In the matter between:

SOUTH AFRICAN AIRWAYS (SOC) LTD

Applicant

and

**SOUTH AFRICAN CABIN CREW ASSOCIATION
obo MEMBERS**

First Respondent

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA obo MEMBERS**

Second Respondent

COMMISSIONER PHALA N.O

Third Respondent

CCMA

Fourth Respondent

Decided: In Chambers

Delivered: 27 March 2024

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

NORTON AJ

Introduction

1. On 5 January 2024 I delivered my judgment making the following orders:

1.1. The ruling of the Third Respondent under case number HO 104-21 dated 11 April 2023 is reviewed and set aside.

- 1.2. SAA's application for the dismissal of the unfair labour practice succeeds.
- 1.3. The ruling of the Third Respondent under case number HO 104 – 21 dated 12 October 2022 that the CCMA has jurisdiction to arbitrate the dispute is reviewed and set aside.
- 1.4. The CCMA has no jurisdiction to arbitrate the unfair labour practice dispute made by the Unions in August 2021.
- 1.5. The Unions are to pay SAA's costs, limited to one counsel.
2. On 19 January 2024, the First and Second Respondents (the "Unions") filed an application for leave to appeal against the whole of the judgment and order, inclusive of the cost order.
3. On 2 February 2024, the Unions filed their submissions.
4. On 12 February 2024, SAA filed its' opposition to the Unions application for leave to appeal.
5. The application has been made in terms of rule 30 of the Labour Court rules read with clause 15 of the Practice Manual.
6. I replicate the Unions' grounds of appeal below. Thereafter I intend to summarise the Unions' and SAA's submissions, and respond to the salient points. I will then address the question of whether or not the Unions have passed the legal threshold for leave to appeal. I conclude with the relevant orders.

The Unions' grounds of appeal

7. Ground 1: *That the Learned Judge erred by incorrectly finding that the Commissioner should have granted the Applicant's dismissal application* ("Dismissal application")

8. Ground 2: *That the Learned Judge erred by incorrectly finding that the exception to Section 158(1)(B) of the LRA found application in this matter.* (“Section 158(1)(B) exception”)
9. Ground 3: *That the learned Judge erred by incorrectly finding that the CCMA lacked jurisdiction based on a finding that the dispute did not constitute an unfair labour practice* (“No Jurisdiction – no ULP”)
10. Ground 4: *That the Honourable Judge erred in finding that the trade Unions should pay the costs of the application*¹ (“Costs”)

The Unions submissions, SAA’s response and the court’s view

Ground 1: Dismissal Application

11. The Unions submit that the court erred by incorrectly finding that the Commissioner should have granted the Applicant’s dismissal application. Whilst the Unions agree that the Commissioner made a material error of law when he held he did not have the power to dismiss the matter, the court should not have held that he should have dismissed the matter, and should instead have remitted the matter back to the CCMA for a decision on the matter.
12. The Unions point to SAA as equally responsible for the delay in the matter. They also submit that the pre arbitration minute was close to finalisation. They say that the reason for the delay in signing the pre arbitration minute was that they could not specify the exact nature of their members complaints with respect to the ULP. Finally the Unions argue that the court failed to appreciate the organisational difficulties confronting them.
13. SAA argues that there was a delay of some 20 months since the referral of the Unions’ dispute and that the parties were no closer to commencing the arbitration. Furthermore the Unions’ consistently failed to comply with the

¹ Paragraph 3 of the Unions Submissions Application for Leave to Appeal

undertakings made at the CCMA to conclude the pre arbitration minute. SAA further points to the concession by the Unions that SAA had good reason to complain about the delays.

14. What is striking to me is that the Union sought to obtain clear instructions from their members about the nature of the ULP in March 2023 some 1.5 years after they had referred the dispute (in August 2021). Surely that process should have preceded the referral. It is not surprising that the Unions delayed the arbitration process and kicked the can down the road, because at the heart of the matter, they were unclear about the very case they had brought to the CCMA. I was in as good a position as the CCMA Commissioner to decide on the dismissal application, with pleadings and bundles of documents before me. I thought it efficient to do so, rather than sending the matter back to the CCMA, causing a further delay in the matter. In my view this ground has no merit.

Ground 2: Section 158 (1B) Exemption

15. The Unions argue that the extent of the delay was only three months, as previous postponements were agreed to or condoned. The Unions also argue that the circumstances in which the exception to section 158(1B) should be invoked is an important matter worthy of the Labour Appeal Court's consideration, which constitutes compelling reasons for why the matter should be heard on appeal as envisaged in s 17(1)(a)(ii) of the Superior Courts Act, 2013.
16. SAA disputes that the delays in the arbitration were consensual. SAA argues that it was only when the dismissal application was dismissed that there was finality, and could approach the Labour Court on the basis of an expedited review.
17. Section 158(1B) prohibits the Labour Court from reviewing any decision or ruling made during conciliation or arbitration before the issue in dispute has been finally determined, unless it is just and equitable to do so. The court referred to the case *Ntombela & others v United National Transport Union &*

*others*² as an example of the exception (to review a commissioner's contradictory rulings). The court considered the review launched by SAA and found in SAA's favour, after taking account the commissioner's legal error that he did not have the power to dismiss for reasons of inordinate delay, and that some 20 months down the line since the referral the Unions did not appear to have established their ULP case. I am though persuaded that the circumstances in which the court may invoke the exception and hear a review whilst a conciliation or arbitration is incomplete is worthy of the LAC's attention.

Ground 3: No Jurisdiction – no ULP

18. The Unions argue that the court's reliance on *Telkom SA Ltd v CCMA*³ was misplaced as the employee was retrenched, but incorrectly pursued an ULP claim. The court in *Telkom* found that an employee aggrieved about a restructuring process must challenge the procedure as part of the S189A process, and not through an ULP. In the Unions case before this court there is no dismissal and therefore they were correct to pursue their dissatisfaction through the ULP regime.
19. SAA disagrees, and argue that the employees should have challenged the mitigating attempts by the business rescue practitioners through section 189A(13) of the LRA.
20. The court agrees with SAA, and furthermore points to the factual paucity of the Unions evidence that they had been the subject on an ULP. Nonetheless the court is of the view that the legal question of whether attempts to mitigate and avoid retrenchment, which give rise to a demotion; may be challenged by aggrieved employees through a section 189A(13) process in the Labour Court or an ULP dispute as envisaged in section 186 (2)(a) of the LRA through an arbitration process at the CCMA or Bargaining Council is worthy of the LAC's attention.

² (2019) 40 ILJ 874 (LC)

³ (2019) 40 ILJ 1093 (LC)

Ground 4: Costs .

21. The Unions argue that they should not be saddled with costs. They point to a current relationship between the parties, trade Unions are organisations not for gain, and that labour related disputes are an exception to the general rule that costs follow the result. Noting the Constitutional Court decision in *Zungu v Premier of the Province of KwaZulu-Natal*⁴, the Unions concluded that “*courts adjudicating labour matters must prefer an approach to costs that will not have a chilling effect on bona fide litigation intended to vindicate labour rights*”.⁵
22. SAA argues that the court was not influenced by wrong principles or a misdirection of the facts. SAA points out that there is no collective bargaining relationship between SAA and the Unions. SAA maintains that the Unions did not meaningfully engage with the grounds of review, and that their opposition to the review challenge with respect to the dismissal ruling was “*vexatious and reckless*”.⁶ A cost order was warranted.
23. The court remains of the view that the Unions pursued the dispute at the CCMA unclear about their facts, and responsible for repeated delays. Costs as contemplated in section 162(2)(b) of the LRA were justified.

Legal considerations

24. When considering the standard in applications for leave to appeal, section 17(1) of the Superior Courts Act 2013 (the “Act”) applies. That section reads,

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that (a)(i) the appeal would have a reasonable prospect of success; or (a)(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

⁴ (2018) 39 ILJ 523 (CC) at

⁵ Unions submissions, para 48

⁶ SAA submissions, para 26

25. The threshold to cross for an audience with an appeal court is a high one, requiring a strong prospect that another court would come to a different decision, or that there are compelling reasons justifying the attention of that court.
26. In *Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others*⁷ Judge Van Niekerk, discussing the test to be applied states,

*“The traditional formulation of the test that is applicable ...requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. ...the use of the word “would” in s 17(1)(a)(i) is indicative of a raising of the raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion...Further this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted...The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which that there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law...”*⁸

Analysis

27. There are two legal issues emerging from grounds 2 and 3 which I believe warrant the LAC's attention and meet the criteria of section 17(1)(a)(ii) of the Superior Courts Act 2013. Those are:

⁷ (2016) 37 ILJ 1485 (LC). See too *Sepheka v Du Pont Pioneer (Pty) Ltd* (2019) 40 ILJ 613 (LC)

⁸ At para 3

- 27.1. the circumstances in which the court may invoke the exception of Section 158(1B) and hear a review whilst a conciliation or arbitration is incomplete; and
- 27.2. whether attempts to mitigate and avoid retrenchment during a section 189A process, which gives rise to a demotion; may be challenged by aggrieved employees through a section 189A(13) process in the Labour Court or an ULP dispute as envisaged in section 186 (2)(a) of the LRA through an arbitration process at the CCMA or Bargaining Council?
28. I am mindful that there too are public interest considerations in this matter, noting that SAA is the first State Owned Company to embark on a voluntary business rescue process, and that there have been hundreds of employees affected by the re-organisation of the entity.
29. I therefore grant the Unions leave to appeal to the Labour Appeal Court.

Order

Leave to Appeal to the Labour Court is granted.

No order as to costs.

D Norton
Acting Judge of the Labour Court of South Africa