



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

LAC Case No: JA40/2024

Court a quo Case No: JR604/23

In the matter between:

SOUTH AFRICAN CABIN CREW ASSOCIATION

obo MEMBERS

First Appellant

NATIONAL UNION OF METALWORKERS OF SOUTH

AFRICA obo MEMBERS

Second Appellant

and

SOUTH AFRICAN AIRWAYS (SOC) LTD

First Respondent

COMMISSIONER MOTLATSI PHALA N.O

COMMISSION FOR CONCILIATION

Second Respondent

MEDIATION AND ARBITRATION

Third Respondent

Heard: 13 May 2025

Delivered: 21 July 2025

Coram: Van Niekerk JA, Nkutha-Nkontwana JA et Basson AJA

JUDGMENT

BASSON, AJA

[1] The two appellants, the South African Cabin Crew Association obo Members (SACCA) and the National Union of Metalworkers of South Africa obo Members (NUMSA), and South African Airways (SOC) Ltd (SAA) (the first respondent) have, since 2020, been locked in a protracted dispute arising from the restructuring of the financially distressed airline.

[2] On 5 January 2025, Norton AJ handed down judgment in favour of SAA reviewing and setting aside the following three rulings handed down by Commissioner Phala:

2.1 A ruling dismissing an application brought by SAA to dismiss the appellants' referral of an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) due to the inordinate delay in the prosecution thereof (*the dismissal ruling*).

2.2 A ruling in terms of which the Commissioner held that the CCMA has jurisdiction to arbitrate the unions' dispute (*the jurisdictional ruling*).

2.3 A ruling granting the unions condonation for the late referral of their dispute to the CCMA (*condonation ruling*).

[2] In reviewing and setting aside the dismissal ruling, the court *a quo* concluded that the Commissioner committed a material error in law when it held that the CCMA does not have the power to dismiss the referral. The dismissal ruling was substituted with a decision that the dismissal application succeeds, with the unions to pay SAA's costs, limited to one counsel. Regarding the jurisdictional ruling, the Labour Court likewise found that the Commissioner committed a material error in law when it was determined that the CCMA had jurisdiction to arbitrate the dispute, as there was no cognisable unfair labour practice dispute before the CCMA.

[3] The appellants sought leave to appeal the Labour Court's order. Only the dismissal and jurisdictional rulings are relevant to this appeal.

What is before this court?

[3] The appellants sought leave to appeal on the following four grounds, namely, that the Labour Court erred -

- 3.1 by incorrectly finding that the Commissioner should have granted SAA's *dismissal application* (ground 1);
- 3.2 by incorrectly finding that the exception to *section 158(1B)* of the Labour Relations Act¹ (LRA) found application in the matter (ground 2);
- 3.3 by incorrectly finding that the CCMA *lacked jurisdiction* based on a finding that the dispute referred to by the appellant did not constitute an unfair labour practice (ground 3);
- 3.4 in finding that the appellants should pay the costs of the dismissal application (ground 4).

[4] The Labour Court held that ground 1 (relating to the dismissal application) had no merit and that the costs order (ground 4) was warranted and justified. In respect of the dismissal ruling (ground 1) the Labour Court dismissed leave to appeal in respect of both the merits of the dismissal application and the decision not to refer the matter back to the CCMA but rather to substitute the dismissal ruling with an order that the dismissal ruling is reviewed and set aside.² Leave to appeal was granted in respect of only the following *two legal issues* arising from grounds 2 and 3:³

- (i) The circumstances in which the court may invoke the exception provided for in section 158(1B) of the LRA and hear the review *in medias res*.
- (ii) Whether attempts to mitigate and avoid retrenchment during a section 189A retrenchment process and which gave rise to a demotion may be challenged in the Labour Court through a section 189A(13) process, or as an

¹ Act 66 of 1995, as amended.

² *South African Airways (SOC) Ltd v South African Cabin Crew Association obo Members and Others* (J604/2023) [2024] ZALCJHB 148, dated 27 March 2024. Judgment in the application for leave to appeal at para 14.

³ *Ibid* at para 27.

unfair labour practice dispute in terms of section 186(2)(a) of the LRA through an arbitration process.

[5] Leave to appeal was therefore granted on two limited legal grounds only. To restate: Leave to appeal was expressly refused in respect of the *merits* of the dismissal application (ground 1). Accordingly, should this Court conclude that the court *a quo* was justified in invoking the exception provided for in section 158(1B), the appellants will find themselves in the unfortunate position that the appeal is thereby effectively disposed of since the dismissal ruling (in respect of which no leave to appeal lies) remains in effect and binding. It follows, further, that the appeal against the jurisdictional finding becomes moot, as the referral of the dispute to the CCMA stands dismissed pursuant to the dismissal ruling.

What is before this court?

[5] A court on appeal generally does not consider grounds of appeal that were not the subject of the granted leave. A refusal of leave by a lower court is final in respect of those grounds, and, until a higher court (usually on petition) grants leave, those grounds cannot be raised.⁴

[6] Despite the limited scope of the appeal and notwithstanding the appellants' acceptance that leave to appeal was granted only in respect of grounds 2 and 3, the appellants nonetheless persisted in advancing all four grounds of appeal. In particular, the appellants contended that the refusal of leave in respect of the dismissal application (ground 1) overlaps with grounds 2 and 3 and is therefore properly before this Court. I do not agree. The Court, in both *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd*⁵ (*Newlands*) and *S v Safatsa and others (Sefatsa)*,⁶ confirmed the principle that a lower court can validly restrict leave to appeal to certain specific grounds. The decision in *Safatsa* is particularly relevant to this matter as leave to appeal in that matter was also restricted to questions of law only. The SCA considered whether leave to appeal can include the factual findings

⁴ *Harlech-Jones Treasure Architects CC and others v University of Fort Hare* 2002 (5) SA 32 (E) at para 56.

⁵ 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 (SCA).

⁶ 1988 (1) SA 868 (A) 877A; [1988] 4 All SA 239 (AD).

made by the court *a quo* or whether the appeal was confined to the three legal questions. The SCA held that the restricted leave to appeal excluded a consideration of findings of fact:

'[T]here was no reasonable prospect of success in relation to the facts found proved by the trial Court, it is difficult to conceive that he could have intended to allow the accused to canvass the trial Court's factual findings on appeal for, *ex hypothesi*, that would have been a futile exercise. This view is fortified by his use of the words 'but on three other grounds, being questions of law', by which the findings of fact were implicitly excluded from consideration. The manner in which the learned Judge enumerated the three specified grounds of appeal, as quoted above, also militates against the possibility that he intended to grant leave in general, unrestricted terms, for it would be difficult to reconcile the way in which he expressed himself with an intention merely to state reasons for granting leave generally. In that light his statement that he was disposed to grant leave to all the accused cannot, in my view, properly be construed as granting leave generally, over and above the three grounds of appeal which had been specified.'⁷

[7] In *Newlands*, the Court held that where an appellant is dissatisfied with the limitation placed on the grounds of appeal, the appropriate remedy is to petition the appeal court for an order removing the restriction on the grounds upon which leave to appeal was granted.⁸

[8] There exists no reason why this court should adopt a different approach. This approach is also consistent with section 166(3) of the LRA, which allows for a leave to be granted subject to any conditions that the court may determine.

⁷ Ibid at 875B – E. See also: *S v Langa en andere* 1981 (3) SA 186 (A) at 189C.

⁸ *Newlands* supra note 3: "[14] It has by now become well settled that when a High Court grants leave to appeal it may limit the grounds of appeal or it may grant leave generally. In the latter event, all relevant issues may be canvassed, including — so it was held in *Yannakou* and other cases — issues of legality albeit that those had not been pleaded or raised by the defendant, as long as they appear from the evidence before the court. But when the High Court has limited the grounds of appeal, as it did in this case, this court has no jurisdiction to entertain an appeal on grounds which had been specifically excluded. The fact that these excluded grounds involve issues of illegality does not detract from this principle. If an appellant is dissatisfied with the High Court's decision to limit the grounds of appeal, its remedy is to petition this court to do away with the limitation. Since *Newlands* has failed to do so, it follows that this court has no jurisdiction to entertain the ground of appeal resting on public policy or illegality, which had specifically been excluded from the ambit of leave granted by the court *a quo*."

[9] Reverting to the facts of the present case. The Labour Court has specifically refused leave to appeal in respect of the *merits* of the dismissal application (ground 1) and specifically limited the ambit of the appeal to two legal issues only. Absent a petition to grant leave in respect of the merits of the dismissal application, the appeal is limited to the two legal grounds on which leave to appeal was granted.

The relevant facts

[5] On 5 December 2019, SAA was placed in business rescue in an attempt to transform the financially distressed airline into a potentially sustainable enterprise. The stakeholders involved in the business rescue proceedings acknowledged that the only way to achieve this goal was to reorganise and downsize SAA's operations and to reach an agreement with employees on more sustainable terms and conditions of employment.

[6] On 18 July 2020, SAA issued a notice in terms of section 189(3) of the LRA to various consulting parties, including the two appellants (SACCA and NUMSA). In the notice, SAA proposed a restructuring of its business, which, if implemented, would necessitate staff reductions due to operational requirements. It was anticipated that, following a consultation process, the restructuring would result in dismissals for operational reasons and a revision of the terms and conditions of employment of those employees retained under the new structure. By the time SAA exited business rescue proceedings on 30 April 2021, its workforce had been reduced from approximately 4,700 to 1,000 employees. Those who remained in employment following the conclusion of the section 189A process were retained on different terms and conditions.

[7] Because the proposed retrenchment exercise involved a large-scale retrenchment as defined in section 189A of the LRA, the consultation process was facilitated by the CCMA. After eight consultation meetings held between 11 August 2020 and 3 October 2020, an agreement was reached between SAA, the Aviation Union of South Africa (AUSA), the National Transport Movement (NTM), Solidarity, STAWU, and the two groups elected to represent non-unionised workers. SACCA

and NUMSA refused to agree to the new terms and conditions of employment or to conclude a collective agreement with SAA arising from the consultation process.

[8] On 4 November 2020, SAA sent a letter to all consulting parties, including SACCA and NUMSA, informing them that the negotiation process had been exhausted and that they would now proceed with implementing a new organisational structure. Employees who could not be accommodated were retrenched, and the remaining staff were assigned to new positions under revised terms and conditions. SAA exited business rescue on 30 April 2021.

[9] Six months later, in August 2021, the unions (SACCA and NUSA) referred an unfair labour practices dispute in terms of section 186(2)(a) of the LRA to the CCMA, claiming unfair treatment of their members with SAA relating to promotion, demotion, and the provision of benefits arising from or resulting from this section 189A process.

Proceedings before the CCMA

[10] On 27 August 2021, the matter was referred to conciliation when SAA raised a jurisdictional issue. According to the jurisdictional ruling dated 30 September 2021, the CCMA was found to have jurisdiction to determine the dispute. The matter was rescheduled for conciliation, but it failed to resolve the dispute.

[11] The dispute was referred to arbitration on 23 November 2021 (the first set down). At the hearing, the CCMA Commissioner directed the parties to conclude a pre-arbitration minute by 30 November 2021 (pre-arbitration ruling). Although SAA had prepared and circulated the first draft, the parties were unable to agree on the contents of the pre-arbitration minute, resulting in no minute being filed with the CCMA.

[12] Despite the absence of the minutes, the matter was again set down for arbitration on 10 February 2022 (the second set down). On that date, SAA challenged the jurisdiction of the CCMA to arbitrate the dispute, arguing that the claim made by the unions related to a reorganisation or retrenchment that had been conducted by SAA. SAA submitted that the complaints concerned the fairness of the

retrenchment process, which does not give rise to a recognisable unfair labour practice dispute and that the dispute therefore fell outside of the CCMA's jurisdiction. On 20 March 2022, Commissioner Phala issued a ruling stating that the CCMA had jurisdiction to arbitrate the dispute (jurisdictional ruling).

[13] The arbitration was again rescheduled for 20 June 2022 (the third set down). On that day, the parties reached an agreement that the unions would deliver their statement of case, followed by a statement of response from SAA. The parties' respective pleadings were subsequently exchanged in accordance with the agreement.

[14] On 15 August 2022, SAA's attorneys (ENS) requested that the unions' attorneys provide them with revised pre-arbitration minutes so that they could be filed with the CCMA by 23 August 2022. When none was forthcoming, ENS wrote to the unions' attorneys informing them that the delay had significantly hampered SAA's preparations.

[15] On 30 August 2022 (the fourth down), SAA again raised a preliminary issue challenging the CCMA's jurisdiction to arbitrate on the basis that the unions' referral was out of time and that condonation was therefore necessary. Once again, the arbitration hearing was unable to proceed. At that time, the unions had still not provided ENS with the revised pre-arbitration minutes.

[16] The unions delivered their application for condonation on 8 September 2022, and on 12 October 2022, the CCMA granted condonation for the late referral (condonation ruling).

[17] By agreement, the CCMA set the matter down for arbitration on 13 and 14 December 2022 (the fifth set down). ENS, in the meantime, once again engaged with the unions regarding the outstanding pre-arbitration minutes. At the hearing on 13 December 2022, the Commissioner again directed the parties to comply with the pre-arbitration ruling. The parties then agreed that the arbitration would proceed on 27 to 30 March 2023 (the sixth set down).

[18] Following further engagement on the pre-arbitration minutes, SAA confirmed on 13 January 2023 that it accepted the amendments to the pre-arbitration minutes and requested the unions to furnish it with the signed minutes. The unions' attorneys advised that the unions could not sign the pre-arbitration minute because they were unable to comply with the time period for delivering their bundle. SAA agreed that the unions may deliver their bundle by 10 February 2023. The unions were once again requested to furnish SAA with the signed pre-arbitration minutes.

[19] On 2 March 2023, in the absence of both the signed pre-arbitration minute and the unions' bundle, SAA filed an application to dismiss the unions' referral to the CCMA on account of the unions' failure to prosecute their referral with the requisite diligence. SAA contended that the unions' conduct had caused SAA to suffer serious prejudice. SAA further submitted that commissioners are enjoined to resolve disputes "*fairly and quickly*" in terms of section 138(1) of the LRA and that a commissioner therefore has the power to dismiss a referral to the CCMA in order to give effect to the primary objectives of the LRA. The unions submitted that their non-compliance with the pre-arbitration ruling stemmed from receiving "*conflicting and ever-changing instructions*" from their representatives, and that they were still in the process of obtaining instructions from their members. The unions also submitted that the delay was not inordinate.

The dismissal ruling

[20] On 11 April 2022, Commissioner Phala delivered the dismissal ruling finding that the CCMA, as a statutory body, lacks in the absence of a specific statutory empowering provision in the LRA, the power to dismiss a matter before the merits have been ventilated. In justifying the decision to refuse the application to dismiss, Commissioner Pala relied on the Labour Court decision in *Solomons v Phokela NO and Others*.⁹ Commissioner Phala noted in the ruling that while some of SAA's concerns about delay were valid, he was not convinced that there had been 18 months of complete inactivity.

⁹ (JR99/2021) [2021] ZALCJHB 192, dated 2 August 2021 (*Solomons*).

[21] Commissioner Phala directed that the matter be set down for hearing notwithstanding the absence of a pre-arbitration minute. The arbitration was rescheduled for 24 to 26 May 2023. At that time, more than 20 months had passed since the dispute was referred to the CCMA, and the matter had yet to proceed to the merits.

[22] Dissatisfied with the latest ruling, SAA applied for an urgent review to the Labour Court, seeking a review of not only the dismissal ruling but also of the jurisdictional and condonation rulings. The matter was argued before the Labour Court on 29 November 2023, and the judgment was handed down on 5 January 2024. Leave to appeal was granted on 27 March 2023. On 17 April 2024, the appellants noted an appeal in this court.

[23] The dispute before the CCMA, therefore, never progressed beyond the initial stages. Almost twenty months later, and several jurisdictional rulings, the proceedings before the CCMA came to an abrupt halt when SAA brought an application to dismiss the appellants' referral.

Labour Court

[24] The Labour Court concluded that the Commissioner committed a material error of law when it found that the CCMA has no power to dismiss a referral. The court pointed out that, although the CCMA is a creature of statute and not a court of law and therefore unable to decide its own jurisdiction, sections 138(1) and (9) read with section 1(d)(iv) of the LRA confer on a commissioner that power. Before us, the parties agreed that the Commissioner erred in ruling that it lacked the power to dismiss a referral.

Section 158(1B): Review in medias res

[25] Returning to the first issue before this Court and bearing in mind the concession that the commissioner committed an error of law in dismissing the application to dismiss the referral, it becomes necessary to consider whether the Labour Court was justified in invoking the exception under section 158(1B).

[26] Although the Labour Court may review interlocutory rulings made by commissioners under section 158(1)(g) of the LRA, sound reasons underpin the Labour Court's reluctance to intervene in incomplete arbitrations. The first reason is policy-related: such intervention *in medias res* would undermine the informal nature of the dispute resolution process. The second reason is that piecemeal reviews would hinder the prompt resolution of labour disputes. This legislative policy was confirmed in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others*¹⁰ as follows.

‘In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court.’¹¹

[26] Section 158(1B) of the LRA gives effect to the policy consideration that judicial intervention would generally be deferred until the issue in dispute had been finally determined. To this end, this section provides that the Labour Court may not review any decision or ruling made during consideration or arbitration proceedings before final determination of the issue in dispute by the CCMA, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling.¹² The court in *South African Broadcasting Corporation (SOC) Limited v Commission for Conciliation, Mediation and Arbitration and Others*¹³ noted that “[a] case must be truly exceptional to warrant a departure from the norm that a review is appropriate only once the dispute has been finally determined in a completed arbitration hearing. This is consistent with the statutory purpose of expeditious dispute resolution which the LRA seeks to achieve”.¹⁴

[27] Exceptional circumstances justifying judicial intervention in incomplete proceedings have been found to exist where such intervention was necessary to

¹⁰ (2009) 30 *ILJ* 2513 (LC); [2009] 8 BLLR 833 (LC).

¹¹ *Ibid* at para 4.

¹² See generally Andrea Joy Zitzke “Just and Equitable” Grounds for Review in Section 158(1B) of the LRA’ (2025) 46 *ILJ* 1550.

¹³ [2019] ZALCJHB 318; (2020) 41 *ILJ* 493 (LC).

¹⁴ *Ibid* at para 14.

prevent illegality, to prevent grave injustice, or where justice could not otherwise be achieved.¹⁵

[28] Judicial intervention is all the more justified where a review is instituted *in medias res* to challenge and set aside a ruling premised on a material error of law. Because section 33(1) of the Constitution¹⁶ affords everyone the right to administrative action that is lawful, reasonable and procedurally fair, the courts are empowered to review errors of law, as long as such errors are material in nature.¹⁷ An error of law arises from questions of law and generally relates to a misinterpretation or misapplication of a legal principle or section in legislation.

[29] The Labour Court (and Labour Appeal) generally has no hesitation in reviewing and setting aside awards and rulings where the arbitrator or commissioner has committed a material error of law.¹⁸ Where a commissioner, for example, commits a material error of law in the interpretation of a collective agreement, the award (or ruling) may be attacked either on the basis of being incorrect (a correctness review) or on the basis that it is unreasonable (reasonableness review). The LAC in *National Union of Metalworkers of SA v Assign Services & others*¹⁹ explains:

[32] An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable.²⁰

¹⁵ *Booyesen v The Minister of Safety & Security & others* (2011) 32 ILJ 112 (LAC); [2011] 1 BLLR 83 (LAC) at paras 53 – 54.

¹⁶ Act 108 of 1996.

¹⁷ *Genesis Medical Aid Scheme v Registrar, Medical Schemes and another* 2017 (6) SA 1 (CC); 2017 (9) BCLR 1164 (CC): “[21] This seems an inappropriately rigid characterisation of both the ground of review and of what happened between the parties here. Constitutional precepts caution against adopting so rigid an approach. By explicitly affording the right to just administrative action, the Constitution bestows on courts the power to review every error of law, provided of course it is ‘material’. PAJA [Promotion of Administrative Justice Act 3 of 2000] embodies this right, in explicit terms”.

¹⁸ See *National Bargaining Council for the Road Freight & Logistics Industry v Deyssel NO & others* (2025) 46 ILJ 1679 (LAC); [2025] ZALAC 25; *National Union of Metalworkers of SA v Motor Industry Staff Association & others* (2025) 46 ILJ 109 (LAC); *Skulpad & another v Department of Health, Eastern Cape & others* (2025) 46 ILJ 193 (LC); [2025] 1 BLLR 70 (LC); *Khanya Cleaning Group (Pty) Ltd v SA Transport & Allied Workers Union & others* (2025) 46 ILJ 363 (LC).

¹⁹ (2017) 38 ILJ 1978 (LAC).

²⁰ See *National Union of Metalworkers of SA v Motor Industry Staff Association & others* (2025) 46 ILJ 109 (LAC) at para 27.

Conclusion

[30] Turning to the first legal question before us, namely, the circumstances in which a court may invoke the exception provided for in section 158(1B) of the LRA and consider a review *in medias res*. It is not in dispute that the commissioner committed a material error of law in holding that the CCMA lacked the jurisdiction to dismiss a referral on account of an inordinate delay in its prosecution. In these circumstances, the Labour Court was correct in finding that it was just and equitable to apply the exception to section 158(1B) and to proceed with the review even though the arbitration proceedings had not yet been concluded. However, as previously indicated, the question whether the Labour Court erred in concluding that the commissioner ought to have granted the dismissal application does not arise for determination in this appeal, leave to appeal on that ground having been refused. The dismissal ruling, accordingly, remains undisturbed. As a consequence, the second ground of appeal—namely, whether the Labour Court erred in finding that the CCMA lacked jurisdiction on the basis that the appellants' dispute did not constitute an unfair labour practice—has become moot.

[31] In the result, the appeal is dismissed. In respect of costs, the requirements of the law and fairness are best served by each party bearing its own costs.

Order

1. The appeal is dismissed.
2. There is no order as to costs.

AC Basson AJA

Van Niekerk JA and Nkuta-Nkontwana JA concur.

APPEARANCES:

FOR THE APPELLANTS: WP Bekker SC
Instructed by Serfontein Viljoen & Swart Attorneys

FOR THE RESPONDENTS: A Redding SC and P Maharaj-Pillay

Instructed by Edward Nathan Sonnenbergs Inc

LABOUR APPEAL COURT