DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

20/2/2020
DATE SIGNATURE

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J 149/20

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA) obo MEMBERS	**First Applicant**
SOUTH AFRICAN CABIN CREW ASSOCIATIO (SACCA) obo MEMBERS	**Second Applicant**

and

SOUTH AFRICAN AIRWAYS (SOC) LTD (IN BUSINESS RESCUE)	**First Respondent**
LES MATUSON N.O.	**Second Respondent**
SIVIWE DONGWANA N.O.	**Third Respondent**
AVIATION UNION OF SOUTH AFRICA (AUSA)	**Fourth Respondent**
NATIONAL TRANSPORT UNION (NTM)	**Fifth Respondent**
SOUTH AFRICAN AIRLINE PILOTS ASSOCIATION (SAAPA)	**Sixth Respondent**

LABOUR COURT

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION (SATAWU) **Seventh Respondent**

SOLIDARITY TRADE UNION (SOLIDARITY) **Eighth Respondent**

NON-UNIONISED EMPLOYEES **Ninth to Further Respondents**

Heard: 14 February 2020
Delivered: 20 February 2020

Summary: Application for leave to appeal – applicable test – opinion that the appeal *would* have a reasonable prospects of success or there are compelling reasons why the appeal should be heard if there are conflicting judgments on the matter under consideration. Where the test is not met leave to appeal should be refused as the law as it stands now it can be given only when the test is met. In *casu* – (a) the opinion is that the appeal would not have any reasonable prospects of success and (b) there are no compelling reasons in that there are no conflicting judgments on the aspect that absent contemplation, the legal duty to consult does not arise. It being trite and established law that if there is no contemplation to dismiss there is no duty to consult. The issue whether normal attrition contemplated in section 136 (1) (a) of the Companies Act mean also dismissal for operational reasons was not a matter under consideration in this matter. Held (1): The application for leave to appeal is dismissed. Held (2): There is no order as to costs.

JUDGMENT – LEAVE TO APPEAL

MOSHOANA, J

Introduction

LABOUR COURT

[1] One of the most intriguing thing for this Court is where a legal representative accepts and executes an instruction to appeal a judgment of a Court before engaging with the reasons advanced by the Court for the order it arrived at[1]. This is what happened in this matter. Before judgment could be handed down, the applicants' representative informed me in chambers that he holds an instruction to appeal the judgment as soon as it was to be handed down by the Court. Indeed, after the order was handed down, the Court was advised of an application for leave to appeal. Leave to appeal is not granted on the strength of how popular the matter is and how loud the losing party may shout. There is a set and legislated test to be met before leave to appeal may be granted.

[2] The application for leave to appeal was heard on an urgent basis. Both parties were in agreement that it must be heard on an urgent basis. I exercised my discretion to hear the application on an urgent basis simply because the respondent did not oppose its hearing on an urgent basis. However, it may be important to point out in this judgment that rule 30 (1) of the Rules of this Court regulates the making of the application and not its hearing by the Court. It is one thing to make an application, it is another thing to have it heard. Rule 8 regulates the granting of an urgent relief.

[3] Being granted leave to appeal is a relief. Before a judge, what an applicant seek is leave to appeal the judgment of the Court. Thus, it is a fallacy in my view to suggest that because rule 30 (1) allows a party to make the application at the time of judgment or order an applicant is thereby entitled to be heard at the same time. All the rule allows a party to do is to make the application. Once made, its hearing in this Court is regulated by the provisions of the Practice Manual, clause 15 thereof. The clause specifically provides that an application for leave to appeal

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[1] In fact, in my view, it is the most condescending and probably an unprofessional thing to do, owing to the test for leave to appeal enunciated in section 17 of the Superior Courts Act 10 of 2013.

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will be decided in chambers unless the judge directs that the application be heard in open Court.

[4] With that practice in place, once a party seeks to obtain leave to appeal on an urgent basis, the provisions of rule 8 must be complied with. Nonetheless, as pointed out above, I heard the appeal in the open urgent Court for reasons set out above. One other reason was that this matter has generated huge public interest and as such speedy resolution is much awaited.

The grounds for appeal

[5] A number of grounds were raised in support of this application. It is unnecessary to tabulate them in this judgment. Suffice to mention that the first respondent (SAA) submitted that those grounds are meritless and should be rejected outright.

The test for leave to appeal

[6] It is by now settled that the Labour Court is a Superior Court and the provisions of the Superior Court Act[2] (SCA) applies to it. Section 16 (1) (a) of the SCA specifically provides that an appeal lies upon leave having been granted. Section 17 (1) deals with the relief of leave to appeal. In terms thereof, leave to appeal may only be granted where a judge is of an opinion that (a) the appeal if granted would, not may, have reasonable prospects of success or (b) there is some compelling reason why the appeal should be heard, including, as a reason, existence of conflicting judgments on the matter under consideration.

[7] It has been confirmed that the use of the words *only* and *would* implies that the threshold is set high to a point where this Court must only give leave in instances where a definitive prospect exists that the appeal

[2] No. 10 of 2013.

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would succeed. As matter of general principle, appeal Courts are more concerned with questions of law. The legal question applicable in this matter is not whether contemplation factually happened but whether a legal duty to consult arose. In other words, had the provisions of section 189 (1) 'kicked in'? The jurisdictional fact to exist for the provisions of the section to kick in is that a contemplation happened. This Court resorted to the literal meaning of the term and concluded that such should be understood from the SAA's point of view. The applicants argued and continue to argue that the test to be applied is an objective one and as such the Labour Appeal Court would come to a decision that the test is objective, which decision would result in the overturning of the judgment and order of this Court.

[8] The LAC has already pinned its colours to the mast on this legal question in the matter of *SACCAWU obo Members v JDG Trading (Pty) Ltd*[3] where it held:

> [26] It is trite that section 189 (1) of the LRA obliges an employer to consult on contemplation of retrenchments. *Du Toit et al Labour Law Through the cases*, after the discussion of the authorities, accurately capture the prevailing legal position about what is required as follows:
>
> > "It would therefore seem that the weight of authority has shifted from a broader to a narrower interpretation of the term "contemplates". Having initially accepted that contemplation of dismissal as one of various options was sufficient to trigger the employer's duty to consult, the courts now appear to take the view that for purposes of section 189, "contemplates" refers to dismissal as the preferred or most likely option from the employer's point of view rather than a mere possibility. It follows that the employer is entitled to go through a process of weighing up various alternatives before dismissal can be said to be "contemplated". However, the employer may not embark on consultation with a closed mind but must be willing to

[3] Case JA140/17 delivered on 17 October 2018.

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seriously consider any further alternatives to dismissal that may emerge in the process."

[9] The above mirrors in exact science, as it were, with what this Court did in the judgment under attack. In light of the above authority, there is no reasonable prospects that the LAC would arrive at a different conclusion than the one already arrived at by this Court. Regard being had to the threshold set, this application does not meet same.

[10] With regard to compelling reasons, it is contended by the applicants that there is a conflicting judgment of this Court[4]. I do not agree that the judgment relied on conflicts with the settled law that once contemplation has occurred a legal duty to consult arises – a point of law which was under consideration in this matter. This matter did not involve itself in the interpretation and application of section 136 (1) (a). In the judgment relied on the labour court interpreted the meaning of the phrase "*changes occur in the ordinary course of attrition*". The said judgment concluded that attrition includes retrenchment. I did not arrive at a different conclusion, nor was it necessary for me to even get there.

[11] The respondent's counsel argued in this matter that the word attrition ought to be given its literal meaning. And in its literal meaning it excludes retrenchment hence the legislature provided specifically for retrenchment in section 136 (1) (b). Although, this issue did not arise in the previous judgment of this Court, there is merit in this submission. In my view, attrition as employed in the section refers to loss of employees through a natural process, such as retirement, resignation, personal health but to the exclusion of retrenchment as provision for it is made in section 136 (1) (b). It would be an unnecessary duplication if the legislature contemplated retrenchment in the two subsections.

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[4] *Solidarity obo Fourie and others v Vanchem Vanadium Products (Pty) Ltd and others* J385/16 delivered on 22 March 2016.

[12] On the issue of application for leave to present further evidence, the contention is that this Court erred in refusing to grant the application. The Appellate Division, as it then was, in *James Brown and Hamer (Pty) Ltd v Simmons N.O*[5] had the following to say:

> "It is in the interest of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge, exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received..."[6]

[13] Therefore, in refusing to grant the application, this Court was exercising a discretion. The general rule is that a court of appeal would be loath to interfere with an exercise of discretion unless it was not exercised judiciously and was actuated by malice and caprice. It would not have been in the interest of justice to receive a transcript that has not been authenticated. Besides, whether that transcript was accepted, it would not have had any impact on the question to be decided by this Court. The fact that an employer has contemplated retrenchment is often proven by the issuance of a section 189 (3) notice and not by some unsubstantiated say so of some station managers. No court would grant this type of an application.

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[5] 1963 (4) SA 656 (A).

[6] See also: *Standard Bank of SA Ltd v Sewpersadh and another* 2005 (4) SA 148 (C).

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[14] In summary, the applicants have failed to meet the required test, both in respect of reasonable prospects of success and in demonstrating compelling reasons. Accordingly, the application must fail.

[15] In the results the following order is made:

Order

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

G. N. Moshoana

Judge of the Labour Court of South Africa

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Appearances

For the Applicants:	Mr Niehaus of Minnaar Niehaus Attorneys, Port Elizabeth.
For the Respondent:	Mr V Mndebele
Instructed by:	ENS Attorneys, Sandton.

LABOUR COURT

TX Result Report

P 1
17/02/2020 10:37
Serial No. A79KD21006334
TC: 72765

Addressee	Start Time	Time	Prints	Result	Note
0105966176	17-02 10:36	00:00:53	001/001	OK	

Note TMR:Timer TX, POL:Polling, ORG:Original Size Setting, FME:Frame Erase TX, DPG:Page Separation TX, MIX:Mixed Original TX, CALL:Manual TX, CSRC:CSRC, FWD:Forward, PC:PC-FAX, BND:Double-Sided Binding Direction, SP:Special Original, FCODE:F-code, RTX:Re-TX, RLY:Relay, MBX:Confidential, BUL:Bulletin, SIP:SIP Fax, IPADR:IP Address Fax, I-FAX:Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF, TEL: RX from TEL, NG: Other Error, Cont: Continue, No Ans: No Answer, Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length Over, POVR:Receiving page Over, FIL:File Error, DC:Decode Error, MDN:MDN Response Error, DSN:DSN Response Error, PRINT:Compulsory Memory Document Print, DEL:Compulsory Memory Document Delete, SEND:Compulsory Memory Document Send.

LABOUR COURTS

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Ref: B Patterson/M Khoza/0469724

Date: Monday, 17 February 2020

Dear Sirs

J 149/20 NUMSA obo MEMBERS & ANOTHER // SOUTH AFRICA AIRWAYS SOC LTD & OTHERS – JUDGEMENT (leave to appeal)

The above matter refers.

Kindly take notice that the order in the above matter will be delivered **in court** on **Thursday, 20 February 2020** at **10h00** at Johannesburg Labour Court situated at **6th Floor Arbour Square, 86 Juta Street, Braamfontein, Johannesburg.**

Kind regards

Riyaana Pandy
Judge's Secretary
Labour and Labour Appeal Court
86 Arbour Square Building,
6th Floor Cnr Juta & Melle Streets,
Braamfontein, 2017
Switchboard: 011 359 5700
Email: RPandy@judiciary.org.za

TX Result Report

P 1
17/02/2020 10:08
Serial No. A79K021006334
TC: 72675

Addressee	Start Time	Time	Prints	Result	Note
0866705397	17-02 10:02	00:00:51	000/001	Cont	
0866705397	17-02 10:07	00:00:52	001/001	OK	

Note TMR:Timer TX, POL:Polling, ORG:Original Size Setting, FME:Frame Erase TX, DPG:Page Separation TX, MIX:Mixed Original Tx, CALL:Manual TX, CSRC:CSRC, FWD:Forward, PC:PC-FAX, BND:Double-Sided Binding Direction, SP:Special Original, FCODE:F-code, RTX:Re-TX, RLY:Relay, MBX:Confidential, BUL:Bulletin, SIP:SIP Fax, IPADR:IP Address Fax, I-FAX:Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF, TEL: RX from TEL, NG: Other Error, Cont: Continue, No Ans: No Answer, Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length Over, POVR:Receiving page Over, FIL:File Error, DC:Decode Error, MDN:MDN Response Error, DSN:DSN Response Error, PRINT:Compulsory Memory Document Print, DEL:Compulsory Memory Document Delete, SEND:Compulsory Memory Document Send.

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Riyaana Pandy

From: Riyaana Pandy
Sent: 17 February 2020 11:22 AM
To: 'bokkebos@mweb.com'; 'bpatterson@ensafrica.com'; 'mkhoza@ensafrica.com'; 'nbanzi@ensafrica.com'; 'smoodley@ensafrica.com'
Subject: J 149/20 NUMSA OBO MEMBERS & ANOTHER // SAA SOC LTD & OTHERS
Attachments: judgment to be handed down.pdf

Importance: High

Good day

The above matter refers.

Kindly find a letter for your attention.

Kind regards

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

Riyaana Pandy
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