Sneller Verbatim/hvdm

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J818/01

2001-03-19

In the matter between

AIRLINK PILOTS ASSOCIATION S.A. Applicant

and

1st Respondent

2nd Respondent

J U D G M E N T

Delivered on 19 March 2001

REVELAS J:

1.This is an urgent application where the urgency of the matter was not disputed by the respondent, who conceded that the circumstances of this matter were such as to warrant dispensing with the normal time periods relating to the launching of applications.

2.The applicant's case is that the first respondent unilaterally amended the terms and conditions of the pilots employed by it and who are members of the applicant. The applicant referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), in terms of section 64 of the Labour Relations Act 66 of 1995 ("the Act").

3.The particular terms and conditions pertinent to this application relate to a certain system in terms of which – save for a few exceptions – the seniority of pilots is the sole criterium for their promotion.

According to the applicant the first respondent did away with this criterium when a new fleet of aeroplanes was acquired by the respondents.

4.The applicant, in the belief that the requirement that pilots forego their seniority constituted a unilateral change to their terms and conditions of employment, seeks the following refief:

5.A declarator that the requirement that pilots who are to be trained for and fly on Embraer Jets must resign form the first respondent and take up employment with the second respondent is a sham, being a device used by the first respondent to avoid its obligations under collective agreements enforce between it and the applicant.

6.A declarator to the effect that the selection of pilots by the first respondent and/or the second respondent for service on Embraer Jets on terms and conditions other than those contained in the said collective agreement (the selection scheme) constitutes a unilateral change to the terms and conditions of employment of the applicant's members.

7.

8.An order, that in terms of section 64(4) of the Act, the first respondent, alternatively the second respondent, further alternatively the first/second respondents shall not implement the selection scheme for the period of the referral to the CCMA in terms of section 64(1)(a) of the Act and that in those instances where the selection scheme has already been implemented the first respondent, alternatively the second respondents shall restore the *status quo ante* for the period of the said referral and costs.

9.In February 2001 the first respondent purchased a number of new jet aircraft from Brazil called Embraer Jets in joint ventures with *inter alia* a Zambian and a Zimbabwean airline respectively, to provide air transport service on new routes for which the second respondent did not

previously hold licences. When pilots commence service with the first respondent, they are placed on a seniority list which is published. Pilots are promoted only when vacancies on more advanced aircraft arise above their position of seniority. It therefore follows that the pilots currently employed by the first respondent are very interested to be trained to fly the new jets for their career advancement.

10.On 11 August 1995 the applicant and Midlands Aviation (Pty) Ltd, trading as **South Africa Airlink**, concluded a written agreement over seniority. There was also another collective agreement preceding this agreement. In terms of clause 7.1 of the August 1995 agreement, the seniority system governs all cases of promotion, demotion, furlough, assignment or re-assignment.

11.Both the first and second respondents are airline companies and they, together with Aviation Maintenance Organisation, ("AMO"), are closely related and associated with each other within what has been described as the **South African Airlink Group**. The Group is not a separate legal entity.

12.The second respondent is a wholly owned subsidiary of the first respondent and it employs no pilots. The pilots are employed by the first respondent and are utilised by the second respond in terms of a so-called wet lease agreement which included the leasing of aircraft, the crew, fuel, maintenance, insurance and other aspects as a package from the first respondent. The second respondent has no collective agreement with the applicant or any other pilot association. There are also other companies in the group. They employ their own crew and operate their own planes.

13. According to the respondents the existing "wet leased" aircraft leased by the second respondent from the first respondent become unsuitable for purposes of the new business venture and the second

respondent wanted its own fleet and air crew.

14.On 15 February 2001 the first respondent announced that the purchase of the new jets necessitated certain structural changes that would take place. Pilots would have to be trained to fly the new jets. The selection criteria for appointing the pilots for the new fleet were that the first respondent would select candidates by invitation to its current pilot corps. Selected pilots were to be rated by their piers. There was also a requirement for psychometric testing.

15.The existing training bond system were extended from three years to four years and the notice period from one to three months.

16.In addition, to qualify for the new fleet, pilots would have to resign from employment with the first respondent and take up employment with the second respondent which became known as **SA Airlink Regional**.

17.The seniority system would no longer apply to pilots who took up employment with the second respondent.

18.There was a strong response to this announcement. It was presented as a *fait accompli* and much of the response evoked was concerned with the seniority system which was no longer applicable to employment with the second respondent and which would be replaced with a meritocracy system.

18.The applicant believes that the first respondent wanted to avoid the application of the seniority list because certain senior captains who would in terms of the seniority rules have to get preference for the positions, might not qualify after training for the new fleet. This prospect was a great financial concern to the first respondent. After training, pilots would also have to undergo a suitability test.

19.The 30 day period mentioned in section 64(1)(ii) and section 64(4)(a) of the Act expires on 5 April 2001. Hence the urgency.

20. The two respondents contend that the second respondent is a separate legal entity, not bound by the seniority system and it does not have any

agreement to that effect with the applicant. It therefore it not obliged to engage in the conciliation process at the CCMA. The respondents further contend that the applicant has an alternative remedy, i.e. to attempt to negotiate new terms and conditions with the second respondent once the new pilots are employed by it, which could include introducing the seniority system. If that attempt fails, it could persuade the second respondent to declare a dispute and follow the routes provided for by the Act, which could ultimately result in a strike.

21.An important requirement for the grant of the relief sought by the applicant is that the separate corporate personalities of the first and second respondents would have to be disregarded, insofar as the decision to introduce a system where seniority was no longer a criterium, is concerned. The so-called corporate veil would therefore have to be lifted.

22.The respondents points out that the new venture embarked upon is coupled with a multi million rand capital investment and that it was ludicrous to suggest that this was done simply to avoid the seniority system provided for in the collective agreement.

23.It is not the applicant's case though, that the venture or expanded programs are shams, but that the decision to disregard seniority was the decision of the first respondent, who was prohibited from doing so by the collective agreement.

24.That brings me to the question of the "element of fraud" as a prerequisite to lifting corporate veil. In *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 1 SA 550 (A) Corbett CJ expressed himself as follows at 566C-F on the subject:

"It seems to me that generally it is of cardinal importance to keep distinct the property rights of a company and those of the shareholders, even where the latter is a single entity,

and the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil, and in this regard it should not make any difference whether the shares held by a holding company or by a government. I do not find it necessary to consider or attempt to define the circumstances under which the court would pierce the corporate veil, suffice it to say that they would generally would have to include an element of fraud, or other improper conduct in establishment or use of the company or the conduct of its affairs. In this connections the words 'device', 'strategy', 'cloak' and 'sham' have been used ..."

25. With specific reference to the aforesaid passage and with regard to the notion of fraud or improper conduct in the context of lifting the corporate veil, Smalberger JA had the following to say in *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 4 SA 1995 790 (A) at 804B-C:

not necessary that the company should have been conceived and founded in deceit and never have been intending to function genuinely as a company before its corporate personality can be disregarded. (As appears in some respects to have been the view of the trial judge.) Gower (op cit) states at 133: 'It also seems clear that a company can be of a facade even though it was not originally incorporated with any deceptive intention. What counts is whether it is being used as a facade at the time of the relevant transactions.'"

26. It was also argued on behalf of the two respondents that to grant the relief sought in this matter would have the effect of merging the two respondents which are in law two separate legal corporate entities. In the Cape Pacific case *(supra)* Smalberger at 804C-D held as follows:

"Thus if a company otherwise legitimately established and operated is business in a particular instance to perpetrate a fraud or for a dishonest or improper purpose, there is no reason in principle or logic why its secret personally cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personalised liability while giving full effect to it in other respects. In other words there is no reason why, what amounts to a piercing of the veil *pro hac vice* should not be permitted."

27. The applicant does not contend that the second respondent is a

fictional employer or an employer in equity. The question is not who is the real employer. The question to be determined in this matter is who the real decision maker was with regard to the abandoning of the seniority system and the amendments to the other terms and conditions relating to the training bond periods and the extended notice period. Each case will have to be considered on its own merits and the following factors are important in determining this question.

28. It is common cause that the day to day managerial responsibilities and control of both respondents rests in Mr Rodger Foster, who is the chief executive officer (CEO) of both companies and who owns 20% of the first respondent. Mr Barry Webb who also owns 20% of the first respondent is a director of the second respondent as well. Mr Duke Moorosi is also a director of both companies. The flight operations management is the same for both companies.

29. These factors would not on their own indicate that the first respondent in effect made the business decisions of the second respondent, but additional and factors indications lending support to such a contention emerge from the facts.

30. The second respondent, it appears, never had it own pilots as is illustrated by the wet lease system.

31. Licences for particular routes are not transferable. According to the applicant, the second respondent's existence as a separate entity was only necessitated in the Group for purposes of maintaining licences for these routes which the first respondent did not hold.

32. The letter announcing the new selection process for the employment of pilots in the second respondent is written on a SA Airlink letterhead and not on a Metavia letterhead. It is written by the Chief Pilot Operations and Standards of the first respondent, who was also the spokesman regarding the restructuring that was to take place within the

first respondent.

33. Another example of the first respondent's role in the Group's decision making is evident form an announcement made in the *Freight and Trading Weekly* in December 1998, when the first respondent acquired the second respondent. The first respondent stated the following:

"South African Airlink has acquired the Nelspruit-based independent Metavia Airlines in a move which adds two new destinations to its portfolio. Metavia will within immediate effect become a wholly owned subsidiary of SA Airlink and will continue to operate as SA Airlink ... SA Airlink will increase its staff complement moderately in view of the growth and expansion presented by the deal."

34. On 1 March 2001, in a letter written to the pilots, (also on the first respondent's letterhead), the Chief Pilot of Operations and Standards stated the following:

"We acknowledge loyalty and hard work in SA Airlink and wish to reward that by offering SA Airlink BA41 captains an opportunity to undergo the selection process." It is clear that this is an invitation by the first respondent and not by the second respondent to the pilots. In a subsequent letter dated 8 March 2001 mention is once again made by the first respondent of pilots being "awarded" for their loyalty by being offered employment within the second respondent. It is highly unlikely that an airline would make such invitations to its senior pilots by another entity, if it were really independent.

35. It was also the first respondent, and not the second respondent, who announced that two captains had been selected for training to fly the new Embraer Jets.

36. Mr Foster, in a memo motivating the structural change, stated that:

"It made business sense for a raft of reasons that this new business opportunity be placed in Metavia's hands, insofar as liberalisation opportunities arise from South Africa". The letter goes on to say that:

"Regardless of where air crew are employed rostering will be centralised with deployment

holistic to the entire SA Airlink Group system."

37.It would appear to me, that the second respondent did not make only independent business decisions regarding the new fleet.

38.A press release about the new expansion project and authored by the first respondent makes no mention even of the second respondent's existence, and speaking on behalf of the first respondent it is stated that "our fleet needed to be increased" and that it, (the first respondent), had ordered the Embraer Jets.

39.What is of further significance is that none of the other employees who are required to work on the new aircraft have to resign from the first respondent as was required from the non-management pilots.

40.A court has no general discretion to simply disregard a company's separate legal personality whenever it is just to do so. (See: **Cape Pacific** *(supra)* at 803A-B and Gower, *The Principles of Modern Company Law* 5th edition at 133).

41.The commercial arrangements in the Group is not under attack. There is no need for it. The abovementioned facts do however demonstrate that the first respondent controlled the second respondent to the extent that it was the sole decision maker, particularly with regard to the employment of pilots. It would appear that the re-employment requirement and the resultant avoidance, of amongst other terms and conditions, the pilots seniority system, is not a decision which emanates from the second respondent but from the first respondent. It appears to be a device to change the terms and conditions of the employment relationship between the first respondent and the applicant.

42.The second respondent has also failed to explain how it adopted and considered the selection process. It did not demonstrate any factual independence of its decision, in sharp contrast with the decisions taken by the first respondent.

43.In my view, the applicant has on a balance of probabilities shown that the decision regarding the new terms and conditions in relation to the Embraer Jets was that of the first respondent, and in that context, the commercial relationship between the first respondent and the second respondent should be disregarded.

44.Insofar as the respondent's argument in relation to an alternative remedy is concerned, it was pointed out by Smalberger J in Cape Pacific Ltd at 805I-J that:

"The existence of another remedy, or the failure to pursue one that was available, may be a relevant factor when policy considerations come into play, but it cannot be of overriding importance. In this regard it is relevant to note that the appellant took time and steps to enforce its contractual claim against LCI."

45.In this matter, the applicant will have to negotiate with the same persons, who had done away with the seniority system in the first place. The route provided for by the Act, namely to approach the CCMA to conciliate the question of the unilateral change to terms and conditions of employmentseems to be the only remedy. The applicant's referral to the CCMA was therefore made in competent terms and the provisions of section 64(4) of the Act may be invoked.

46.In the circumstances, I grant the relief as set out in paragraphs 2, 3 and 4 of the notice of motion, with costs to include the cost consequent upon the employment of two counsel.

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E. Revelas

On behalf of Applicant:

Adv K.S. Tip SC with Adv P.A. Buirski,

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On behalf of Respondent:

Mr. S. Snyman of Snyman, Van den Heever, Heyns.