THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

CASE NO: J 1507/2020

In the matter between:

THE AIRLINE PILOTS' ASSOCIATION OF SOUTH AFRICA	Applicant
and	
SOUTH AFRICAN AIRWAYS SOC LIMITED	First Respondent
LES MATUSON *N.O*	Second Respondent
SIVIWE DONGWANA *N.O*	Third Respondent

Date heard: 29 December 2020

Date of judgment: 29 December 2020. Judgment delivered by email to the parties' attorneys of record at 16h00.

JUDGMENT

VAN NIEKERK J

[1] The applicant, the Airline Pilots Association of South Africa, represents 96% of the pilots employed by the first respondent, South African Airways (SAA). In these proceedings, filed on an urgent basis, the association seeks a final order declaring a lock-out implemented by SAA to be unlawful and unprotected, and other related interdictory relief. Although the lock-out has been directed particularly against the South African Airways Pilots Association, a duly constituted branch of the applicant, the distinction is not material, and I refer to the applicant as 'the association'. Where it is necessary to draw a distinction, the applicant is referred to as APASA, and its constituent branch as SAAPA. In terms of section 133 (1)(a) of the Companies Act, 2008, the business rescue practitioners have consented to the institution of these proceedings.

[2] These proceedings have their roots in an agreement between the parties, referred to as the 'regulating agreement'. In essence, the agreement is a collective agreement as defined by the Labour Relations Act (LRA), which recognises the association as the sole bargaining agent of all pilots employed by SAA and regulates their terms and conditions of employment. The agreement is perhaps unique in that it is not determinable on notice, not even a period of reasonable notice as contemplated by section 23(4) of the LRA. The regulating agreement terminates only when a new agreement is reached between the parties, a provision upheld in an arbitration award issued in 2002 in respect of a similar provision in the regulating agreement's predecessor. SAA has long sought to renegotiate the terms of the regulating agreement, and the association has resisted the various attempts made over the years to do so.

[3] Matters came to a head after SAA was placed in business rescue on 5 December 2019. A business rescue plan was adopted on 14 July 2020 and contemplates, amongst other things, the retrenchment of the majority of SAA's employees, and changes to terms and conditions of employment of those who remain employed.

SAA contends that the existing terms and conditions of employment applicable to its employees, particularly the pilots, are more favourable than those that other airlines offer to their employees, with a consequent negative impact on SAA's profitability. SAA contends further that the rescue of the business is not possible unless an arrangement is implemented which reduces employment costs. SAA acknowledges that it may not unilaterally cancel the regulating agreement, which would continue to apply to any pilots who after any retrenchment, remain employed. For that reason, SAA sought, once more, to secure the association's agreement to the cancellation of the regulatory agreement and a commitment by the association to negotiate new terms and conditions of employment for its members. The specific demands tabled by SAA include the termination of the regulating agreement, its annexures and all other collective agreements concluded between the parties, revised salaries for captains and first officers and revised terms and conditions of employment for pilots within a new organisational structure. The association did not agree to any of the demands, and little progress was made in the negotiations On 30 October 2020, SAA referred the dispute to the CCMA.

[4] On 16 December 2020, SAA issued a notice of lock-out in terms of section 64 (1)(c). The notice reads, in part:

> On 7 September 2020, SAA sent a letter to SAA PA articulating certain demands that SAAPA and its members were required to agree to. The letter contained annexures which fully detail the new terms and conditions of employment and new salary scales for Captains and First Officers.
>
> Having exhausted the internal dispute resolution process in respect of those demands, on 30 October 2020, SAA referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) concerning matters of mutual interest. The parties subsequently engaged in extensive negotiations regarding the termination of the regulating agreement and all other collective agreements concluded between SAA and SAAPA. The parties also engaged on reaching agreement on new terms and conditions of employment for pilots and

> new salary scales. Unfortunately, the parties were unable to reach an agreement on any of these issues and the statutory 30-day period referred to in section 64 (1) (a) of the Labour Relations Act 66 of 1995 ("the LRA") expired on 30 November 2020.
>
> Accordingly, SAA hereby gives notice that all SAAPA's members (excluding those members listed to in annexure A) will be excluded from SAA's workplace with effect from 12h00 on Friday, 18 December 2020 until such time that SAAPA accepts the demands made on this lock-out a letter on its own behalf and on behalf of its members and agrees to such demands…
>
> For the duration of the lock-out and the exclusion of SAAPA's members, SAAPA's members who are locked out will not be entitled to be paid any remuneration or benefits in the course of and for the purpose of that exclusion…

[5] It is not in dispute that the procedural requirements established by section 64 of the LRA for a protected lock-out have been met. SAA referred a dispute to the CCMA in terms of section 64(1)(a) of the LRA on 30 October 2020. The 30-day period referred to in section 64 expired on 29 November 2020. On 16 December 2020, SAA provided at least 48 hours' notice of the lock-out as required by section 64(1)(c).

[6] The association raises four grounds on which it contends that the lock-out is unprotected and/or unlawful. The first is that the lock-out constitutes a suspension by SAA of all of the provisions of the employment contracts of the association's members, and that any suspension of an employment contract during business rescue is prohibited by section 136 (2A) (a) (i) of the Companies Act. Secondly, the association contends that since SAA has ceased to operate, there is no 'workplace' as envisaged by the terms of the definition of 'lock-out' in section 213 of the LRA. Thirdly, the association contends that the lock-out notices issued by SAA are invalid to the extent that they exclude certain members of the association and because the notice contains demands which differ from and are in addition to the demands previously made by SAA and the terms of its referral to the CCMA. Finally, the association submits that the lock-out is unprotected because it is in

breach of section 65 (1) (b), which provides that no person may take part in a lock-out if that person is bound by an agreement that requires the issue in dispute to be referred to arbitration. In this regard, the applicant contends that SAA is bound by a collective agreement ((the 'resolution of disputes collective agreement' signed in 1999) that requires the issue in dispute to be referred to arbitration. I deal first with the relevant legal principles and then turn to evaluate the applicant's submissions.

[7] Section 213 of the LRA defines a lock-out to mean:

> The exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees contracts of employment in the course of or for the purpose of that exclusion.

It is apparent from the definition that a lock-out comprises three essential elements. First, there must be an exclusion of employees by the employer from the employer's workplace, the purpose of that exclusion must be to compel the employees to accept a demand made by the employer, and thirdly, the demand must be in respect of any matter of mutual interest between employer and employee (see *Technikon South Africa v NUTESA* [2001] 1 BLLR 58 (LAC)). The substantive limitations on the right to lock-out mirror those that apply to the right to strike (see section 65). Similarly, the procedural requirements established by section 64 (1) apply to lock-outs. An employer engaged in a protected lock-out enjoys indemnity against any liability in delict for any breach of contract committed by engaging in a protected lock-out (section 67 (2)), and no civil proceedings may be instituted against the employer who implements the lock-out (section 67 (4)). Employees who are locked out are thus not entitled to remuneration, despite the fact that they may tender their services during the course of the lock-out.

[8] Although the lock-out does not enjoy the same express recognition in constitutional terms as the right to strike (see section 23 (2) (c) of the Constitution), this does not

mean that the lock-out is bereft of any constitutional recognition. On the contrary, in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), the Constitutional Court acknowledged that the right to bargain collectively implies that each party to a collective bargaining relationship should have the right to exercise economic power against the other. In other words, while the right to strike and the right to lock-out are not equivalent, the court recognised that by virtue of the right to engage in collective bargaining in terms of section 23 (5), employers both individually and collectively had at their disposal the means to exercise power through dismissal, employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of employees from the workplace (i.e. a lock-out). In other words, an employer's right to resort to economic weapons in the collective bargaining process (including resort to a lock-out), remains regulated within a constitutional framework, derived as they are from the right of employers to engage in collective bargaining.

[9] As I have indicated, the association relies on s 136 (2A) of the Companies Act to contend that the lock-out constitutes an unlawful suspension of the employment contracts of those of its members who have been locked out. The essence of the applicant's submissions is that a lock-out constitutes a suspension of an employment contract, which is prohibited by section 136 (2A).

[10] Section 136 of the Companies Act reads (in part) as follows:

> **Effect of business rescue on employees and contracts**
>
> (1) Despite any provision of an agreement to the contrary—
>
> (a) during a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that—
>
> (i) changes occur in the ordinary course of attrition; or
>
> (ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and

(b) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act 66 of 1995), and other applicable employment related legislation.

(2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may—
(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that—
(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
(ii) would otherwise become due during those proceedings; or
(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).

(2A) <u>When acting in terms of subsection (2)—</u>
<u>(a) a business rescue practitioner must not suspend any provision of—</u>
<u>(i) an employment contract;</u> or
(ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act 24 or 1936), would have applied had the company been liquidated (own emphasis).

[11] Counsel referred to the Oxford English dictionary definition of 'suspend' which, amongst other things, is defined to mean to 'halt temporarily'. By locking out the association's members, so the submission went, SAA was depriving them of their rights to be remunerated upon tendering the services, thereby halting temporarily (i.e. suspending) their employment contracts in breach of section 136 (2A) (a) (i).

[12] The first issue to be decided is whether a lock-out constitutes a suspension of a contract of employment. If it does, the prohibition against suspension contained in section (2A) potentially applies. SAA submits that a lock-out constitutes a breach of contract, rather than a wholesale or partial suspension of any terms of the employment contract of an employee who is locked-out. In the definition and regulation of the lock-out, the LRA makes no reference to suspension. The

definition (in section 213) makes specific reference to a breach of contract. What the definition requires is an exclusion from the employer's workplace, *whether or not* the employer breaches employees' contracts of employment, in the course of or for the purpose of that exclusion. In other words, an exclusion from the workplace may or may not constitute a breach of the employment contract, but no mention is made of the suspension of any of the terms of the contract. The conception of industrial action having the consequence of a suspension of the employment contract found some support from Lord Denning in *Morgan v Fry* [1968] 2 QB 710, but has not attracted much purchase. In South African law, a reading of the definitions of 'strike' and 'lock-out' and the protections extended by section 67 to protected strikes and lock-outs, disclose that the model adopted by the legislature is one of indemnity for breaches of the employment contract that a strike and a lock-out respectively occasion.

[13] In any event, in my view, the prohibition against the suspension of employment contracts established by section 136 (2A) does not apply to a lock-out, because section 136 (1)(a)(ii) specifically contemplates and permits changes to terms and conditions of employment in accordance with applicable labour laws. That section provides that '*the employees and the company, in accordance with applicable labour laws, [may] agree different terms and conditions'.* The LRA recognises collective bargaining as a means to change terms and conditions of employment, and expressly permits a resort to strikes and lock-outs as legitimate measures to press for agreement to a proposed change. Strikes and lock-outs are part and parcel of the collective bargaining process established by the LRA; indeed, they are essential elements of and integral to collective bargaining (see *South African Transport and Allied Workers Union v Moloto N.O and Another* 2012 (6) SA 249 (CC)). To the extent that counsel for the association submitted that a conclusion to this effect would undermine the purpose (reflected in section 136 (2A) of protecting the work security of employees engaged in an enterprise that is under business rescue, the protection is self-contained, in the form of the requirement that any agreement to any change in terms and conditions of employment be made

'*in accordance with applicable labour laws*'. The rights of employees affected by business rescue proceedings to their security of employment and terms and conditions of employment are thus not disadvantaged and enjoy the same rights as any other employee.

[14] Further, on the approach advocated by the association, there would be an inconsistency between the Companies Act and the LRA. The Companies Act itself provides, in section 5, that if there is any inconsistency between any provision of the Act and the provision of national legislation, to the extent that it is impossible to comply with one of the inconsistent provisions without contravening the second, in the case of certain defined statutes, their provisions prevail. Section 5 (4) (b) (i) includes the LRA in the list of statutes that trump the Companies Act. This provision is reinforced by section 210 of the LRA, which provides that if any conflicts relating to matters dealt with in the Act arises between the LRA and the provisions of any other law save the Constitution or any Act expressly amending the LRA, the provisions of the LRA will prevail. In other words, even if the lock-out constitutes a suspension from employment (which I have found that it does not), any prohibition on any suspension by a business rescue practitioner of an employment contract in the terms of the Companies Act must yield to the exercise of employer rights under the LRA.

[15] It follows that section 136 (2A) of the Companies Act and in particular, the prohibition of on the suspension of employment contracts in section 136 (2A) (i), does not have the effect that lock-outs are prohibited during the course of business rescue proceedings.

[16] The second ground on which the applicant attacks the lock-out is that there is no 'workplace' as envisaged in terms of the definition of lock-out. If there is no workplace, there can be no exclusion from the workplace, whether or not that exclusion breaches employees contracts of employment. It is not in dispute that but for limited repatriation and cargo flights, SAA has not operated a commercial

flying schedule since 27 March 2020. All aircraft leases have been terminated and the remainder of SAA's aircraft, which it owns, are in storage and not currently capable of being used to conduct commercial operations. Pallets have not been paid since March 2020 and have not flown since April 2020, but for the few pilots that have flown the repatriation and cargo flights. In essence, SAA is under care and maintenance and its operations have been mothballed. It is in the circumstances that the association submits that there is no physical place of work constituted by any physical premises of SA and thus no workplace as envisaged in terms of the definition of lock-out.

[17] A workplace as defined in section 213 to include '*the place or places where the employees of an employer work.*' More specifically, the applicant contends that since SAA has ceased all operations and has been under business rescue for a year, there is no 'place or places where [the association's members] work'. Counsel's submission assumes that the reference to the 'employer's workplace in the definition of lock-out necessarily assumes a physical exclusion from a physical workplace. The definition has not been construed in such restrictive terms. For example, in *NUCCAWU v Transnet Ltd* [2001] 2 BLLR 203 (LC), Waglay J found that the denial of a right to be considered for day-to-day employment constituted a lock-out. It would seem then that the definition is sufficiently broad to extend to breaches of an employment contract (and other acts) that do not necessarily entail a physical exclusion from the employer's workplace. (See Cheadle et al *Strikes and the Law* (Lexis Nexis 2017) where it is suggested that 'exclusion' can take various forms and is not necessarily confined to physical exclusion (at p 131)). In any event, the reference to 'workplace' in the definition of lock-out must be appreciated in the context of the interpretation afforded that term by the courts. In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC), the Constitutional Court made clear that the notion of a 'workplace is flexible and not geographically bound to a specific place (see paragraphs 24 to 29 of the judgement). In particular, the court found that the focus is on employees as a collectivity, and that location is a

relatively immaterial factor. What is primary is functional organisation. In the present instance, the business of SAA continues, and the association's members continue to tender their services. In that sense, the association's members are and remain excluded from a workplace for the purposes of the definition of lock-out.

[18] Insofar as the applicant contends that the lock-out notices are invalid because they did not extend to certain members of the Association, the lock-out notice excludes a number of listed employees. The purpose of this exclusion is not apparent, but the association contends that SAA's failure to lock out all of the affected employees is fatal. The association concedes that section 64 (1) (c) of the LRA does not explicitly preclude an employer from excluding any employees from a lock-out, but submits that this is implicit on account of the fact that a lock-out notice that is selectively applied cannot achieve the purpose of compelling employees to accede to the employer's demand, and because section 64 (1) (c) requires notice of any lock-out to be given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees that are parties to the dispute.

[19] There is nothing in the LRA which requires an employer to include all employees within the scope of an intended lock-out. It is not uncommon in the case of strikes for strike action to be implemented on a selective basis, by targeting particular operations, perhaps at different times (sometimes referred to as a grasshopper strike). Further, many strikes involve participation only by certain employees and not by the entire workforce. The LRA does not require that a strike or lock-out involved all employees of an employer (or all of those in respect of whom a dispute was referred. The association's approach requires a reading into section 64 (1) (c) which is simply not there.

[20] To the extent that the applicant submits that the lock-out notices are invalid because they contain demands which differ from and which are in addition to the demands contained in the referral of the dispute by SAA to the CCMA, the association complains specifically that the lock-out notice makes reference to the

terms of severance payments (a matter not referred to in private correspondence) and that the correspondence makes reference to the retention of terms and conditions of employment for pilots within a new organisational structure, whereas the demand in the lock-out notice refers to new terms and conditions of employment for pilots reflected in a proposed and attached collective agreement. The association submits that the differences are material and that it is inimical to the purpose of lock-out for the lock-out notice to defer, in substance, from the demands of the employer that are the subject of the dispute referred to the CCMA.

[21] What the LRA requires is that the 'issue in dispute' must have been referred to conciliation, and it is only the issue in dispute that may legitimately form the basis of any subsequent strike or lock-out. In the present instance, the issue in dispute is the proposed termination of the regulatory agreement and the negotiation of new terms and conditions of employment for the association's members. That is the dispute that was referred to conciliation, and that is the subject of the notice of lock-out. It is not for this court to adopt a technical, narrow approach and confine legitimate industrial action to bargaining positions as they are recorded in CCMA referral forms. Collective bargaining by definition is a dynamic process, the purpose of which is to engage with bargaining partners and find compromise. It is inevitable that bargaining positions will continually shift in the course of the search for consensus. In any event, in the present instance, the demand for the conclusion of an agreement for new terms and conditions of employment for pilots (the dispute that was referred to the CCMA), included severance pay to be paid to retrench pilots, a provision that is always been the subject of dispute between the parties. In any event, the right to engage in industrial action in pursuit of a permissible demand does not evaporate on the addition of any impermissible demand (see *Transport and Allied workers Union of South Africa obo Ngedle and others v Unitrans Fuel and Chemical (Pty) Ltd* 2016 (11) BCLR 1440 (CC)). There is no suggestion by the association and none of the demands that fell within the scope of the referral of the dispute to the CCMA can form the subject of a protected lock-out.

[22] Finally, the association relies on the 'resolution of disputes collective agreement' to submit that the demands made by SAA or demands in respect of the issues that ought properly to be resolved in terms of the agreement. The agreement provides that should a dispute arise relating to the interpretation or application of any collective agreement between the parties, that dispute must be resolved by a referral to arbitration and if the dispute remains unresolved after conciliation, by a referral to arbitration. SAA's demand, so the association submits, is for the termination of the regulating agreement and the conclusion of a new collective agreement. In other words, the association submits that the true nature of the dispute concerns the issue of whether the regulating agreement ought to be brought into operational use, i.e. that it should not be applied. That being so, the association submits that section 65 (1) (b) applies and precludes SAA from resorting to any lock-out on the basis that it is bound by a collective agreement that regulates the issues in dispute and which requires the matter to be referred to arbitration.

[23] It is well-established principle that this court will look to the substance of a dispute to determine its true nature (see *Coin Security Group (Pty) Ltd v Adams & others* [2000] 4 BLLR 371 (LAC)). What SAA seeks, through a process of collective bargaining, is to induce an agreement by the association to cancel the regulatory agreement in its entirety and to secure an agreement on new terms and conditions of employment. SAA does not dispute the validity of the regulatory agreement, nor its application for the period that it remains in force. This is manifestly not a matter that concerns the interpretation or application of the regulatory agreement, and there is thus no merit in this submission.

[24] In summary: the lock-out by SAA of the members of the association does not constitute a suspension of their employment contracts. The exclusion from the workplace in the present instance constitutes a breach of contract. Because the lock-out is protected, SAA is indemnified against any of the legal consequences

that would ordinarily flow from a breach of the employment contract. It follows that any limitations that the Companies Act imposes on a business rescue practitioner to suspend any employment contract are not applicable. In any event, section 136 (2A) contemplates that during business rescue, agreed changes to conditions of employment may be secured. Collective bargaining is a legitimate vehicle through which to secure consent to changed terms and conditions. Integral to collective bargaining is the right to industrial action. A business rescue practitioner may therefore engage in collective bargaining and initiate any legitimate economic pressure to press for proposed changes to employment terms. Further, by virtue of section 5 of the Companies Act and section 210 of the LRA, the provisions of the LRA trump any such limitations, and thus entitle a business rescue practitioner to lock out employees in terms of the LRA. The fact that SAA has been placed in business rescue and that its operations have been mothballed does not mean, for the purposes of the LRA, that there is no 'workplace' in respect of which any lock-out can lawfully be implemented. The lock-out notices issued by SAA are not invalid by virtue of their application only to certain of its employees, members of the association, or because they articulate demands that are substantially different to those that were the subject of the referral by SAA of the dispute between the parties to the CCMA. The referral to conciliation and the notice of lock-out reflect the same issue in dispute. Finally, the demands that form the subject of the lock out are, in essence, demands that call for the termination of the agreement and for new terms and conditions of employment to be negotiated. The demand is not one that seeks to interpret or apply a collective agreement. The substantive limitation on a lock-out established by section 65 (1) (b) of the LRA therefore has no application.

[25] The application thus stands to be dismissed on the basis that the association has failed to establish a clear right to the relief that it seeks. In the circumstances, it is not necessary for me to consider the remaining requirements for interdictory relief.

[26] Finally, in relation to costs, neither party sought costs against the other. For the purposes of section 162 of the LRA, the requirements of the law and fairness are best served by there being no order as to costs.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv A Oosthuizen SC, with him Adv L Hollander, instructed by Fluxmans Inc.

For the respondents: Adv AIS Redding SC, with him Adv R Itzkin, instructed by ENS Africa Inc.