NOT REPORTABLE

CASE NO.: LC 16/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA AIRLINE PILOTS' ASSOCIATION **Applicant**

and

AIR NAMIBIA (PTY) LTD **Respondent**

CORAM: **PARKER J**

Heard on: 2011 February 21

Delivered on: 2011 February 24

JUDGMENT

PARKER J: [1] The applicant launched an application by way of Notice of

Motion filed with the Court on 18 February 2011 in which the applicant prayed for relief on urgent basis in terms of the prayers set out in the Notice of Motion, and relied on a founding affidavit deposed to by Captain Tyron Mario Meyer. On 21 February 2011 by a Notice of Opposition supported by the respondent's answering affidavit deposed to by Theopoltina Miriam Namases the respondent moved to oppose the application. In its answering affidavit the respondent raised a point *in limine* to the effect that the relief sought, if granted will affect Giovanni Scholtz, Patrick Schaubode, Heino Windhisch and Patrice Katanga ('the pilots') and yet the pilots have not been joined and, according to the respondent, 'the failure to join the pilots is fatal and therefore the Court should not deal with the matter without a joinder being affected.' On that basis the respondent prays the Court to dismiss the application with costs.

[2] Faced with that preliminary objection, the applicant then filed on 22 February 2011 at 07H45, that is less than two hours to the time set down for the hearing of the application, what it calls 'Amended Notice of Motion'. Ms. Bassingthwaighte, counsel for the applicant, informed the Court that the same founding affidavit that had been filed in support of the original Notice of Motion is also in support of the 'Amended Notice of Motion'.

[3] It is worth noting that, as I see it, the original Notice of Motion had relied on '*the provision of Part D of the respondent's flight operations manual* (Annexure TM 12' to the founding affidavit)' ('the manual') as the legal basis on which the application rests for life. But the Amended Notice of Motion relies for life on 'the *provisions of Part D of the respondent's fight operations manual and* (in compliance with) *the provisions of the collective agreement between the parties*' (Annexure TM5' to the founding affidavit)'. (Italicized for emphasis).

[4] It would seem realizing that it has no legal answer to the respondent's preliminary objection respecting non-joinder of the pilots if it relied on the manual only, the applicant then decided to file with the Court barely two hours before the hearing of the application, as aforesaid, an amended Notice of Motion so as for the application to rest on the manual and the collective agreement for life. It is, therefore, to the interpretation and application of the manual and the collective agreement that I now turn my attention to see if the manual and the collective agreement can sustain the applicant's answer to the respondent's preliminary objection concerning the non-joinder of the pilots.

[5] The golden thread that runs through the applicant's amended Notice of Motion is that in virtue of the manual and the collective agreement no training (referred to in prayer 2.1 of the Notice of Motion), no appointment (referred to in prayer 2.2), no appointment (referred to in prayer 2.3) and no promotion, employment or training (referred to in prayer 2.4) should take place without the approval of the respondent's selection board in terms of the manual and the collective agreement.

[6] The selection board appears at para 1.2.14.1 of the manual and it consists of six members as follows:

(1) Responsible Person Flight Operations: Chairman

(2) Chief Pilot: Member *(Alternate Chairman)*
Responsible Person Training: Member *(Alternate Chairman)*

(3) Fleet Training Captains *(Instructors):* Member
Fleet Captains: Member
Manager, Human resources: Member

The executive members of the applicant are not members of the board; they

have merely observer status on the board; and so they cannot take part in the making of any decision by the board. That being the indubitable fact, the applicant cannot speak for the board, as it appears to be doing in these proceedings; and the applicant has not shown that it has the authority of the board to speak for it. But, more important, the function of the board as appears immediately after the membership provision as set out previously is this:

> The board will convene to consider candidates for upgrade or downgrade and to select Cadet Entry Pilots and Direct Entry Pilots.'

[7] As Mr. Hinda, counsel for the respondent, submitted more than once, the pilots are already employed as pilots by the respondent and what the board may 'convene to consider' does not include in-service training of pilots. Thus, by bringing this application and relying on Part D of the manual in order not to cite the pilots, who are the persons being trained and who on any pan of scale have a direct and substantial interest in the outcome of this application, the applicant has been flying but it cannot reach its destination, being the pursuance of the application.

[8] But that it not the end of matter, in a rearguard action - and that is what the Amended Notice of Motion is, as explained previously - the applicant now relies on the collective agreement to say that the non-joinder of the pilots is not fatal to the application. In considering this point, I must keep it firmly in my mental spectacle that what we have here is a labour matter involving employees governed by the Labour Act, 2007 (Act No. 11 of 2007) and so the consideration of the applicant's reliance on the collective agreement must perforce be subjected to the relevant provisions of the Labour Act.

[9] On this point Ms Bassingthwaighte submits as follows. The applicant is recognized as 'the bargaining agent' in the respondent, *qua* bargaining unit, in terms of the 'Amended Recognition as Bargaining Agent Agreement' (Annexure TM4' to the founding affidavit). The pilots are employees represented by the applicant in the bargaining unit (i.e. the respondent). The pilots are bound by the collective agreement. The applicant has approached the Court to enforce the collective agreement against the respondent. No order is sought against the pilots. *Ergo,* the pilots are not entitled to be joined as parties to the application and their non-joinder is not fatal. With the greatest deference to Ms Bassingthwaighte, that submission has no merit. First, the applicant is not recognized as 'the exclusive bargaining agent' of the employees within the respondent within the meaning of s. 64 of the Labour Act. In my opinion, Ms Bassingthwaighte cannot in these proceedings claim for the applicant statutory powers and advantages which the applicant does not have and cannot have. I am fortified in my view by the provisions of s. 64 (1), read with s. 70 (1) (d), of the Labour Act which in relevant parts provide:

> **Recognition as exclusive bargaining agent of employees**
>
> 64. (1) A registered trade union that represents the majority of the employees in an appropriate bargaining unit is entitled to recognition *the exclusive bargaining agent of the employees* in that bargaining unit for the purpose of negotiating a collective agreement on any matter of mutual interest.
>
> ……..
>
> **Legal effect of collective agreements**
>
> 70. (1) A collective agreement binds -
>
> (a) the parties to the agreement;
>
> (b) ...
>
> (c) ...
>
> (d) the employees in the recognised bargaining unit, if a trade union that is a party to the agreement *has been recognised as an exclusive bargaining agent in terms of section 64;* and
>
> (e).....

(Italicized for emphasis)

[10] The irrefragable fact that remains *in casu* is that the applicant's position in terms of the Labour Act is that of recognized bargaining agent. It has not been recognized as 'the exclusive bargaining agent' in the bargaining unit. As I have said previously, the issues raised in the application are governed by the Labour Act. This Court is not entitled to assume that which is outwit the Labour Act. This Court cannot assume that since the applicant is a bargaining agent in the respondent it follows without more that it is an exclusive bargaining agent, too, capable of claiming what s. 64 and s. 70 of the Labour Act give to exclusive bargaining agents. That would be amending the statute; an exercise which this Court has not one jot or tittle of power to do. Accordingly, I find that that applicant relies on that which does not exist to support its contention that the pilots are not entitled to be joined as parties in the application.

[11] For the aforegoing reasoning and conclusions, I feel confident to uphold the respondent's point *in limine* respecting the non-joinder; the failure to join the pilots is without a doubt fatal for the instant application. The application cannot be sustained.

[12] Mr. Hinda submitted that the application should be dismissed with costs. In my opinion, the applicant may have been misguided and overzealous in bringing the application; but I do not think its conduct has reached the mark of vexatiousness or frivolousness within the meaning of s. 118 of the Labour Act to attract the Court's discretion to award costs in favour of the respondent.

[13] Whereupon, I make the following orders:

(1) The application is dismissed.

(2) There is no order as to costs.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Adv. N Bassingthwaighte

Instructed by: GF Kopplinger Legal Practitioners

COUNSEL ON BEHALF OF THE RESPONDENT:

Adv. G Hinda

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