

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**Case no: J 1179\ 97**

**In the matter between:**

**STEYL JOHAN MAREE**

**Applicant**

**AND**

**Ibis Air**

**Respondent**

**JUDGMENT**

**MLAMBO J.**

1. This is an application to amend the citation of the respondent and join two further respondents as second and third respondents. The applicant had also applied to join two other respondents as fourth and fifth respondents, but a settlement agreement was concluded with the applicant agreeing to contribute an amount of R 6000 -00 towards the legal costs of the would be fourth & fifth respondents. The applicant no longer proceeds against these further individuals.

**Background facts**

2. The applicant was dismissed from employment on 12 September 1997 per letter from attorneys acting on the alleged instructions of Ibis Aircraft (Pty) Ltd. On 15 September 1997 the applicant referred a dispute to the Commission for Conciliation Mediation and Arbitration (“the Commission”) regarding an alleged automatically unfair dismissal /discrimination. Cited as employer (Respondent) is Capricorn Flights CC t/a Ibis Air. The Commission was unable to resolve the dispute through conciliation and the applicant referred the dispute to this court for adjudication. The applicant cited the respondent simply as Ibis Air in its statement of claim. In paragraph 2 of the statement of claim the applicant states the following:

**“The Respondent is Ibis Air. As will appear from what is set out below, the respondent trades as Ibis Air. It further appears from the Respondent’s letterhead (1997), that the Respondent is described as Ibis Aircraft Limited t/a Ibis Air. In addition however, the Respondent has in the past been described as Capricorn Systems CC t/a Ibis Air. In both instances, the corporate entity is a company duly incorporated in terms of the company laws of the Republic of South Africa with their principal place of business being Hanger L/6/1 Simera, Atlas Road, Bonearo Park, PO Box 16832 Atlasville, 1459, Telephone number (011) 395 2062, Fax number (011) 395 2063.”**

3. In the application before court the applicant seeks to:
- 3.1 amend the citation of the Respondent from Ibis Air to Capricorn Systems CC;
  - 3.2 join Ibis Aircraft Limited as the Second respondent and;
  - 3.3 join Andries Jacobus Geldenhuis (“Geldenhuis”) as the Third respondent.

Applicant’s submissions.

4. Mr Van As representing the applicant submitted, in relation to the prayer for

the amendment of the citation, that it was apparent that the applicant had acted incorrectly when he cited the Respondent as Ibis Air. Mr Van As submitted that this was apparent from the respondents' own version (contained in the response to the statement of claim) that the applicant had acted incorrectly.

Paragraph 1 of the response to the applicant's statement of claim reads:

**“The respondent is CAPRICORN SYSTEMS CC, a duly incorporated close corporation with principal place of business at 120 Simon Bekker Avenue, Comoc, Hartebeespoort.**

**The Respondent will accept notices and service of all documents at the address of its attorneys stated hereunder.”**

5. Mr Van As argued further that in terms of the Respondent's response, cited above, the Respondent alleges that the applicant was employed and dismissed by Ibis aircraft Limited. He argued that Geldenhuis has, at all material times, acted as member of Capricorn Systems CC and director of Ibis Aircraft Limited and was therefore integrally involved in the affairs of both entities which indicated that he also had a direct and substantial interest in the outcome of this matter. Mr Van As argued that it was clear that there was an employment relationship between the applicant on the one hand and Capricorn CC, Ibis Aircraft Limited and Geldenhuis on the other.

#### The Respondent's submissions

6. Mr Botha, representing Capricorn, Ibis Aircraft Limited and Geldenhuis,

submitted that the court had no jurisdiction to hear this matter. He submitted that the applicant was employed and dismissed by Ibis Aircraft Limited which was a foreign company (registered in one of the Channel Islands, Guernsey), he performed his duties outside of the Republic of South Africa, Ibis Aircraft Limited operated outside the Republic of South Africa (RSA) and the applicant was paid his salary in dollars via a bank account in London.

7. Mr Botha further submitted that the application falls to be dismissed because the statement of claim contains no factual basis for the applicant's dismissal to be classified as automatically unfair. He submitted that the dispute should have been referred to arbitration by the Commission if one followed the factual basis laid in paragraph 26.1 of the statement of claim. In that paragraph the applicant cites the following paragraph from his letter of dismissal:

**“Your client has elected not to follow the normal grievance procedures, he does not liaise through the Chief Pilot who happens to be your client's brother, and the Chief Pilot elects not to take appropriate steps against your client but prefers to act passive”**

8. As regards the citation point Mr Botha argued that Capricorn Systems CC is a completely different and independent concern to that cited in the referral for conciliation. He argued that the applicant should have started the proceedings from the beginning (against Capricorn Systems CC) and not simply seek to change the name of the respondent. Mr Botha further submitted that Geldenhuis and Capricorn Systems CC have no interest in the outcome of this

matter and will not be prejudiced by any finding of this court. He further submitted that no dispute had been declared by the applicant against Capricorn Systems CC, Ibis Aircraft Limited and Geldenhuis.

#### The application

9. It is common cause that Ibis Air is the trade name of Ibis Aircraft Limited. It is also common cause that the applicant was dismissed on the instructions of Geldenhuis who is a member of Capricorn Systems CC and the managing director of Ibis Aircraft Limited. A letter instructing the applicant to report to an office of Ibis Aircraft Limited in South Africa is in the letterhead of Ibis Aircraft Limited.
10. The allegation by Geldenhuis to the effect that the applicant was in the employ of Ibis Aircraft Limited is not disputed as the applicant failed to serve and file replying representations. It seems justified therefore to accept that the applicant was in the employ of Ibis Aircraft Limited.
11. It is so too that there is no such entity known as Capricorn Flights CC. A known entity is Capricorn Flights (Pty) Ltd of which the applicant is a member or shareholder. No relief is sought against Capricorn Flights SA (Pty) Ltd nor does it seem that this company featured in any way as regards the employment

and dismissal of the applicant.

12. It is clear however that the reference in paragraph 5 of the applicant's statement of claim, to the name Capricorn Flights CC must be an error. In the preceding sentence the applicant states that De Bruin and Geldenhuis registered Capricorn Systems CC and discontinued operating Capricorn flights SA (Pty) Ltd. The applicant states that the need to register a close corporation was for the close corporation to act as agent for the asset holding Ibis Air and manage the assets from within Johannesburg. It is the court's view that the context clearly indicates that the applicant intended to refer to Capricorn Systems CC and not Capricorn Flights CC which is non-existent.

13. The applicant also states that the respondent is Ibis Aircraft (Pty) Ltd trading as Ibis Air. He further states that the respondent has, in the past, been described as Capricorn Systems CC trading as Ibis Air and that this close corporation with Ibis Aircraft Limited comprise the corporate entity of "a company duly incorporated in terms of the company laws of the Republic of South Africa with their principal place of business being Hanger C/r/1 Simera Atlas Road, Boreoro Park, PO Box 16832 Atlasville, 1459, Telephone (011) 395 2062, Fax number (011) 395 2063."

14. The addresses and telephone and telefax numbers mentioned by the applicant

are identical to those appearing in the letterhead of Ibis Aircraft Limited. The applicant's allegations in this regard especially, in regard to the reason for the registration of Capricorn Systems CC i.e. to act as agent for Ibis Air, are not disputed by Geldenhuis in any of the affidavits he has signed. These allegations must therefore stand.

15. Put in their proper content these allegations confirm the allegation by Geldenhuis that Ibis Aircraft Limited is a foreign registered company, but importantly it is the asset holding company with Capricorn Systems CC being its agent in South Africa. This must therefore mean that in as far as any business transactions or dealings in South Africa involving Ibis Aircraft Limited, Capricorn Systems CC also has a direct interest therein. This is explained by the position of Geldenhuis being a member of Capricorn Systems CC and managing director of Ibis Aircraft Limited. Geldenhuis does not dispute that Capricorn Systems CC is an agent of Ibis Aircraft Limited.
16. This can only mean that Capricorn Systems CC also utilizes the same addresses and telephone and telefax numbers as are used by Ibis Aircraft Limited in South Africa. This is explained by the receipt of a statement of claim at that address by Geldenhuis and more telling is the admission by Capricorn Systems CC, in the response to the statement of claim, that it, (Capricorn Systems CC) is the respondent. Geldenhuis states that the

registered address of Capricorn Systems CC is 120 Simon Bekker Avenue, Cosmos, Hartebeespoort. The fact that the statement of claim was sent to the addresses of Ibis Aircraft Limited but receipt was acknowledged on behalf of Capricorn Systems CC must mean that the two entities have common interests.

17. All the above demonstrates that the applicant's employment relationship was not with Ibis Aircraft Limited only but also extended to Capricorn Systems CC as agent of Ibis Aircraft Limited in South Africa.

18. Mr Botha submitted that this court has no jurisdiction to hear this matter because Ibis Aircraft Limited is a foreign based company, that the applicant was contracted to perform his duties outside of South Africa; that Ibis Aircraft Limited operated outside of South Africa and that the applicant was paid in US dollars via a bank account situated in London, Great Britain.

18. Du Toit and others in **"The Labour Relations Act of 1995" 2<sup>nd</sup> edition (Butterworths) 1998** states at page 61 that the factor which connects employees to a particular area is the place where they work. The Labour Appeal Court in **Chemical Workers Industrial Union v Sopellog (1993) 14 ILJ 144 (LAC)** at 151 has also suggested that the place of work is decisive. In **Gensec Mei v Industrial Council for the Iron Steel, Engineering and Metallurgical Industry 1995 (1) SA 563**, the Appellate Division commented that it was possible, and in fact it invariably occurred,

that the employers' undertaking is carried out at a different area from the location of the workplace. The court was of the view that the location of the workplace may have been equated with that of the carrying on of an undertaking in **Chemical Industrial workers union v Sopolog CC (1993) 14 ILJ 144 (LAC)**.

19. Was the applicant's presence in South Africa for purposes of carrying on an undertaking of either Ibis Aircraft Limited or Capricorn Systems CC? The applicant states that whilst he was in Johannesburg on 12 September 1997 he was advised by attorneys acting for Ibis Aircraft Limited that he was dismissed with immediate effect. He states that he had earlier (on 3 September 1997) been advised that he would no longer be required to perform his scheduled flight duty which was to commence on 7 September 1997. The applicant describes the South African activities of Ibis Aircraft Limited as the employment of air and ground crew as well as administering the maintenance, insurance and contractual aspects of such an operation. Sight should also not be lost of the contents of a letter dated 8 September 1997 sent to the applicant by Ibis Aircraft Limited where he was instructed to come to the office on 9 September 1997 after failing to report for duty at Lanseria Airport.

20. One can deduce from the above that the applicant, when performing his duties, reported for duty in South Africa (Lanseria Airport in this instance) and then commenced his flight duty outside of South Africa. If one also considers the

applicant's allegation regarding the South African operations of Ibis Aircraft limited (which are undisputed) one can only arrive at a conclusion that the operations of Ibis Aircraft Limited outside of South Africa were managed and administered in South Africa. This would therefore mean that the Labour Relations Act no 66 of 1995 applies to the operations carried on by Ibis Aircraft Limited in South Africa.

21. If one considers the matter as a whole it is clear that the usage of the name Ibis Air by the applicant in his referral documents and statement of claim meant that he intended to cite Ibis Aircraft Limited Ltd as respondent. Furthermore because Capricorn Systems CC was also (according to the applicant) known as Ibis Air at some stage must also mean that the applicant intended Capricorn Systems CC to be a respondent in the proceedings. In the court's view the two entities, though having separate corporate identities, were engaged in the same activity and operations in South Africa and have a direct and substantial interest in the order or judgement of this court in this matter.

22. It is also the court's view that it is not necessary for the applicant to prepare fresh referral documents regarding Ibis Aircraft (Pty) Ltd and Capricorn Systems CC. As already stated above, no entity known as Capricorn Flights CC was in existence. The referral documents and statement of claim were meant for Ibis Aircraft (Pty) Ltd and Capricorn Systems CC hence they were

served at the address utilized by these entities. These documents were received on behalf of these entities and in that sense these entities had knowledge of the conciliation proceedings at the Commission and the proceedings in this Court.

23. As far as Geldenhuis is concerned, it is correct that he is the managing director of Ibis Aircraft Limited and a member of Capricorn Systems CC. He has also featured prominently in the dispute with the applicant. There is however nothing before me to indicate that his role in the dispute was nothing more than as managing director of Ibis Aircraft Limited. The court was given no basis whatsoever for the need to pierce the corporate veil of the two entities and join Geldenhuis as a respondent in his personal capacity. In these circumstances the court cannot join Geldenhuis as a respondent in these proceedings. The applications must, therefore, succeed in respect of the amendment of the citation of the respondent and the joinder of Ibis Aircraft Limited as second respondent.

24. The submission, by Mr Botha, that the allegations in the statement of claim cannot found a claim for automatic unfair dismissal, do not take the matter any further. This court has stated that where a party alleges that a statement of claim lacks the necessary averments to found a claim that party is free to lodge an exception against the claim. See **Van Rooy v Nedcor Bank (1998) 5 BLLR 540 (LC)**.

25. The order of the court is therefore:
26. The citation of the respondent is amended to be Capricorn Systems CC.
27. Ibis Aircraft (Pty) Ltd trading as Ibis Air is joined as the second respondent.
28. The application for the joinder of Andries Jacobus Geldenhuis as third respondent is refused.
29. The applicant is ordered to pay the costs of Andries Jacobus Geldenhuis.
30. The applicant is ordered to pay the costs of C Steyl and L Luitingh in the amount of R 6000-00.
31. The respondents, Capricorn Systems CC and Ibis Aircraft Limited are ordered to pay the applicant's costs.

MLAMBO J

Date of judgment: 12 May 1999

For the applicant: Mr Van As instructed by Denys Reitz attorneys.

For the respondents: Mr Bothat Sc with Mr Van Graan, instructed by Willie Van Der Westhuizen Attorneys.