REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA24/2012

In the matter between:

INTERVALVE (PTY) LTD **First Appellant**

BHR PIPING SYSTEMS (PTY) LTD **Second Appellant**

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA obo its MEMBERS **Respondent**

Heard: **05 September 2013**

Delivered: **26 March 2014**

Summary: joinder application- Respondent seeking joinder of appellants in the Labour Court- conciliation prerequisite in Labour disputes- principles that all dismissal matters must be conciliated before referred to arbitration or adjudication restated. Labour Court Rules providing for joinder application cannot supersede mandatory requirement for conciliation provided by the LRA. Labour Court lacking jurisdiction to entertain the joinder application- Appeal succeeds and application for joinder dismissed.

Coram: Waglay JP, Francis and Dlodlo AJJA.

JUDGMENT

WAGLAY JP

Introduction

[1] Intervalve (Pty) Ltd ("Intervalve") and BHR Piping Systems (Pty) Ltd ("BHR") are the first and second appellants in this matter. They come to this Court with leave of the Labour Court (Steenkamp J) to set aside the order of the Labour Court joining them as respondent parties in the action instituted by the National Union of Metalworkers of South Africa ("NUMSA") against Steinmüller Africa (Pty) Ltd ("Steinmüller").

Background

[2] NUMSA brought the action on behalf of 204 of its members all of whom were dismissed on 20 April 2010 for participating in a strike. These members were employed by Steinmüller, Intervalve and BHR. NUMSA timeously referred this dismissal dispute to the Metal and Engineering Industries Bargaining Council ("the Bargaining Council") for conciliation. The only party cited as the employer in the referral was Steinmüller. A conciliation meeting was held on 19 May 2010 and failed to resolve the dispute. At the conciliation meeting, Steinmüller pointed out to NUMSA that many of the members on behalf of whom it referred the dispute to the Bargaining Council were not employed by it.

[3] Arising from the above information, NUMSA made another referral to the Bargaining Council to conciliate the dispute. This time it alleged that the employer party was Steinmüller alternatively Intervalve, alternatively BHR alternatively KOG Fabricators (Pty) Ltd t/a Bellows Africa. As this referral was made outside the period prescribed by the Labour Relations Act 66 of 1995 ("the LRA"), NUMSA sought condonation for the late referral. The Bargaining Council refused the condonation application hence the referral was not

entertained by it. NUMSA did not seek to review the refusal by the Bargaining Council to grant it condonation for the late referral of the dispute.

[4] On 17 August 2010, NUMSA filed its Statement of Claim averring that its members were dismissed unfairly. Again, only Steinmüller was cited as the employer party. Steinmüller then lodged an application to remove various causes of complaint in the Statement of Claim. About seven months after the filing of its Statement of Claim, NUMSA brought an application to join Intervalve and BHR and two other entities as respondents to the unfair dismissal action it had instituted against Steinmüller.

[5] The Labour Court granted the application thus joining the parties to the action instituted by NUMSA against Steinmüller. Intervalve and BHR opposed the application. The other two parties who were joined did not oppose the application: they are both labour brokerage companies.

The Joinder application

[6] It is clear when regard is had to the application brought by NUMSA to join the four further respondents that the application was brought in terms of rule 22(2)(a) of the Rules for the conduct of proceedings in the Labour Court. The founding affidavit addressed three issues in support of the application viz:

(i) the steps NUMSA took to ascertain who were the true employers of the members on behalf of whom NUMSA instituted the action against Steinmüller;

(ii) the *"direct and substantial interest that the parties sought to be joined"* had in the action instituted by NUMSA against Steinmüller; and

(iii) the absence of any prejudice to Steinmüller or the parties sought to be joined if the application succeeds.

[7] On the first issue, NUMSA set out how it spent months attempting to reconcile its members with Steinmüller, Intervalve and BHR as their specific employers. On the issue of direct and substantial interest which Intervalve and BHR had

in the action, NUMSA stated that because Intervalve and BHR employed certain of the members of NUMSA on whose behalf NUMSA instituted its action against Steinmüller, Intervalve and BHR have a direct and substantial interest in the said proceedings, adding, mostly in its replying papers that: BHR, Intervalve and Steinmüller form part of the same group of companies and have certain directors and shareholders in common; BHR, Intervalve and Steinmüller have a number of "shared services" which include *inter alia,* Payroll Administration and Human Resources (HR) services; the dismissal of the individual employees was consequent upon a strike action at the premises shared by amongst others, Steinmüller, Intervalve and BHR; the strike was handled, from the employers' side, by the shared HR services of the three companies; the shared HR Services communicated with employees using a document on a letterhead bearing the names of all three entities Steinmüller, BHR and Intervalve- and signed by a single member of management, Mr J Abert, under the designation "General Manager"; the shared HR Services of Steinmüller, Intervalve and BHR maintain a single system of records in respect of their employees; some employees of Steinmüller, Intervalve and BHR, were required to sign an addendum to their employment contracts reflecting the names of all of these entities, regardless of the identity of the employer; Steinmüller, Intervalve and BHR acted with a single voice and face throughout the events that culminated in the dismissal of the individual employees, in particular in effecting their dismissal; the shared HR Services prepared and issued identical dismissal letters to all employees on a letterhead reflecting the names of Steinmüller, Intervalve and BHR; that the operations, personnel, identities and other characteristic of the three companies *"are interwoven in that the three companies have a parity of interest"* in relation to the members on whose behalf NUMSA instituted an action against Steinmüller. NUMSA finally averred that any order that it may obtain against Steinmüller it might have to execute against the other two companies.

[8] With regard to the issue of prejudice, NUMSA outlined why none of the parties sought to be joined would suffer any prejudice if joined: as BHR and Intervalve

already had full knowledge of the proceedings to date because of the shared HR Services; BHR and Intervalve have full and ready access to the shared records in respect of the individual employees; and, the attorneys for Steinmüller (who also act for Intervalve and BHR) furnished the respondent's attorneys with documentary records drawn from the shared HR Services with lists, which they amended on more than one occasion, purporting to identify the correct employer of each of the individual employees.

[9] Finally, in its founding affidavit, NUMSA states that it continues to hold the view that Steinmüller is in fact the true employer of the members on behalf of whom NUMSA has instituted the action. Its application for joinder should therefore be seen, in my view, as a cautionary exercise.

[10] Intervalve and BHR argue that the joinder is not permissible principally on two grounds:

(a) that the Labour Court has no jurisdiction to entertain an unfair dismissal claim brought by NUMSA against Intervalve or BHR because the condition precedent, that a matter first be conciliated before being referred to adjudication was not met; and

(b) that NUMSA has failed to satisfy the requirement that the parties it seeks to join have a *"substantial interest in the subject matter of the proceedings"* as required by Rule 22.

[11] The starting point must be whether the Labour Court had jurisdiction to entertain the dispute brought by NUMSA on behalf of its members against Intervalve and BHR. In the absence of having the jurisdiction to entertain the dispute the issue of joinder does not arise.

[12] The dispute between the parties is one of dismissal based on participation in a non-procedural strike. In terms of s191 of the LRA, such disputes must, firstly be referred to conciliation within 30 days of the date of the dismissal (although the non-compliance with the 30 days' time limit may be condoned on good cause shown) and, if the matter remains unresolved after

conciliation, the dispute must be referred for adjudication to the Labour Court and this must be done within 90 days after a certificate of non-resolution of the dispute at conciliation is issued. Again the non-compliance with the 90 day time period can be condoned on good cause shown.

[13] The relevant sub-sections of section 191 which regulate the above position provide:

> **"191. Disputes about unfair dismissals and unfair labour practices**
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> *(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to*
> *(i) a council, if the parties to the dispute fall within the registered scope of that council; or*
>
> *(ii) the Commission, if no council has jurisdiction.*
>
> *(b) A referral in terms of paragraph (a) must be made within -*
>
> *(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;*
>
> *(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.*
>
> *(3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.*
>
> *(4) …*
>
> *(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved –*
>
> *(a) …*

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –

…

(6) to (10)…

(11) (a) The referral, in terms of subsection (5) (b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.

(b) However, the Labour Court may condone non-observance of that timeframe on good cause shown."

[14] NUMSA as has been recorded earlier referred the unfair dismissal dispute against Steinmüller both for conciliation and to the Labour Court *prima facie* in compliance with s191. NUMSA did refer a dispute for conciliation against Intervalve and BHR but this was done outside the prescribed time limit and it was rejected by the Bargaining Council on the basis that NUMSA failed to show good cause as to why the referral should be entertained. In the circumstances no dispute against Intervalve and BHR was referred for conciliation. Based on the non-referral of the dispute for conciliation and relying on the judgment of this Court in *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* ("*Driveline*"),[1] Intervalve and BHR aver that the Labour Court has no jurisdiction to entertain a dispute between NUMSA and them. In *Driveline,* Zondo AJP (as he then was) with Mogoeng AJA (as he then was) concurring held that:

"… the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication."[2]

[1] (2000) 21 ILJ 142 (LAC).
[2] At 160A.

[15] NUMSA, however, argued that where a dispute involves more than one employer, there is no requirement that each employer must of necessity be party to a conciliation process as the Labour Court has a discretion to join parties to an already commenced matter. For this it relied on the judgments of the Labour Court in *Selala and Another v Rand Water*[3] ("*Selala*") and *Mokoena and Others v Motor Component Industry (Pty) Ltd and Others*[4] ("*Mokoena*").

[16] In the matter of *Mokoena,* the employee party sought to join three further respondents in the action it had instituted against the Motor Component Industry (Pty) Ltd (the "respondent"). The parties sought to be joined were not cited in the referral the employee party had made for conciliation, nor was there any referral made for conciliation against them. The Labour Court there took the view that *"as long as the dispute has been the subject of proper conciliation, even if all the parties did not participate in such conciliation the aforesaid jurisdictional requirement is satisfied"*[5]. The court then, relying on the Labour Court judgment of *Selala* stated that it *"has a discretion to join parties to a matter, even if they did not participate in the preceeding conciliation process".*[6] (Participation in the context of the above statements is not intended to convey a failure to take part in the process but not being cited as a party in the referral of the dispute for conciliation). The Court in *Mokoena* then went on to hold, rather curiously, that individual employees *"who were not identified in the dispute referral form [for conciliation] and did not participate in the conciliation proceedings"*[7] could not refer their dismissal dispute to adjudication or arbitration because of non-compliance with s191(1) and (3) of the LRA. In *Mokoena*, the Labour Court allowed the joinder of one of the parties. The party joined was a party that the Labour Court held had taken over the respondent's business in circumstances that invoked s197 of the LRA. In terms of this section where a business is transferred as a going

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[3] (2000) 21 ILJ 2102 (LC).
[4] (2005) 26 ILJ 277 (LC).
[5] At page 279 G
[6] At page 279 E-F
[7] At page 281 J

concern the transferee takes over the employment responsibilities of the transferor. The joinder was thus granted not on the basis of any exercise of a discretion of joining a party not taken to conciliation but because s197(9) of the LRA placed the new employer in the shoes of the old employer.[8] In the circumstances, there was no need to refer both the new and the old employer to conciliation any one would suffice as judgment against one was effective against the other. The party joined in *Mokoena* was in the same position as the respondent. In fact the Court in granting the joinder said:

> "Section 197(9) of the Act stipulates that, in such a transfer situation, the old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer. Section 197(2)(a) provides that the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer. If the applicants, in the instant matter, succeed in proving that they were unfairly dismissed, any reinstatement order or compensation order made in their favour would be enforceable against the transferee, the third respondent. In those circumstances, the third respondent is an interested party (*Halgang Properties CC v Western Cape Workers Associations* [2002] 10 BLLR 919 (LAC) at 927J-928C and should be joined to the proceedings."[9]

[17] Likewise in *Selala,* while the Labour Court held the view that it had a discretion to join a party who was not taken to conciliation, it was neither called upon to exercise a discretion nor did it do so. In that matter, it joined a co-employee of the applicant as a respondent. The co-employee was employed in a position which the applicant alleged should have been his. The co-employee's rights were therefore affected and it had to be party to the proceedings. The joinder there was therefore necessary before the applicant could proceed with its case because it is obliged to join all parties that may be affected by the relief it seeks. The joining of the co-employee was not

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[8] See in this respect *Foodgro v Keil* [1999] 9 BLLR 875 (LAC), *NEHAWU v University of Cape Town* 2003 (2) BCLR 154 (CC) and *Anglo Office Supplies (Pty) Ltd v Lotz* (2008) 29 ILJ 953 (LAC).
[9] At 281F-H.

consequent upon a dispute that the applicant had with the co-employee, the applicant's dispute was with its employer but the co-employee had to be cited as his/her rights would have been affected in the matter. Since there was no dispute between the co-employee and the applicant there was no need for applicant to take the co-employee for conciliation.[10]

[18] NUMSA also referred to various other authorities pointing to the fact that formalities imposed by a statute were not self-serving and even if the formalities required by statutes were peremptory, not every deviation is fatal particularly if the deviation results in the statutory provision being achieved.[11] In this matter, so NUMSA argued, the object of the conciliation process, that the parties sit together and try and resolve the matter was achieved: there was a proper referral although Steinmüller was the only party cited; the representative of Steinmüller or its HR department was exactly the same as those representing Intervalve and BHR; these representatives did not indicate that they would want NUMSA to sit and talk about its members who were dismissed by Intervalve and BHR, nor do they say that now; hence the objective of the process has been achieved.

[19] Finally, NUMSA argued that to close the door to an action against Intervalve and BHR on the basis of non-compliance with s191 of the LRA would represent an *"unbecoming approach to labour legislation and deny certain members of NUMSA from having their day in court. That a pragmatic and realistic approach must be adopted in interpreting legislation such as this so that constitutional right to fair labour practice triumphs over technical obstacles to access to have one's disputes determined."*

[20] In this matter, at the conciliation meeting, following upon the referral made by NUMSA citing only Steinmüller as the employer, NUMSA was informed that they needed to include other employers in the dispute as Steinmüller was not

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[10] See in this respect *Public Servants Association v Department of Justice and Others* [2004] ZALAC/(7 January 2004)unreported judgment of this court.
[11] See *Unlawful Occupiers of the School Site v City of Johannesburg* [2005] 2 All SA 108 (SCA).

the sole employer of the members on behalf of whom NUMSA referred the dispute for conciliation, yet it failed to act with any degree of haste before referring the dispute for conciliation in respect of the other employees. When condonation for the late referral was refused, it again did nothing for months and then sought via the back door, so to speak, to get Intervalve and BHR included as respondents in the action.

[21] NUMSA's excuse that it took months from the information provided by Steinmüller, Intervalve and BHR to determine whom worked for who is unhelpful. The court is not told whether NUMSA had signed membership forms which could or could not assist them to ascertain who the true employer was of each of the members or why their wage slip was not obtainable (the employers indicated that the employees pay slips should have alerted NUMSA as to who was the employer of the individual member). NUMSA's averment that its members were all across the country and difficult to contact is less than convincing, as this would imply that had the employers made any offer of settlement and if Numsa decided not to accept the offer unless it spoke to its members it would take months for NUMSA to obtain instructions to respond. I do not accept this. Also having regard to the fact that Intervalve BHR and Steinmüller constituted the three employers why were they not jointly cited as employers when the matter was originally referred for conciliation? There was no requirement to set out exactly which member worked for which employer at that stage, or it could be explained that the members worked for one alternatively for the other. It is evident from the papers filed that NUMSA held the view, which it still does, that Steinmüller is the only real employer of its members in this matter.

[22] Neither *Selala* nor *Mokoena* is of any assistance to the respondent. The view expressed in both those judgments that the Labour Court has a discretion to condone non-compliance with the requirement that before a dispute can be referred to arbitration or adjudication it has to be referred to conciliation, as provided by s191 of the LRA, is wrong. Rules that provide for the conduct of proceedings in a court cannot trump or override the clear provisions of an Act. So even if NUMSA met the requirements of Rule 22 because it could not have

proceeded against Intervalve and BHR at the time they brought the application to join Intervalve and BHR, it cannot succeed by simply piggybacking on Steinmüller. Rule 22 like any other Rule does not create a right it is there to accommodate existing rights.

[23] Finally, on the issue of constitutional right to have a day in court; this right is not to be exercised at a litigant's pleasure. The Act is clear. It makes provisions which must be complied with. There is nothing unconstitutional about that. One cannot fail to comply with the steps that are required to be followed to enforce a right and then complain that these steps which you have failed to follow now impinges your constitutional right, particularly when there is a right to purge that failure and no steps are taken or properly taken to purge the failure. When NUMSA failed to refer the dispute to conciliation timeously, it applied for condonation for its late referral which was not granted but NUMSA did not challenge this refusal. In these circumstances, it cannot be said they are being denied their day in Court.

[24] In summary: NUMSA failed to comply with s191(1) read with s191(3) in that, it failed to refer on time the dispute against Intervalve and BHR to conciliation, nor was it able to show good cause why the referral it made to the bargaining council was out of time. In the absence of conciliation, it is not entitled to refer its dispute for adjudication to the Labour Court as provided in s191(5). The Labour Court does not have jurisdiction to entertain the dispute, and as such it serves no purpose to consider whether the application for joinder has merit.

[25] Notwithstanding the above, I need to add that the application for joinder based as it is on Rule 22(2)(a), is without merit. Intervalve and BHR have no direct and substantial interest in the dispute between NUMSA and its members on the one hand, and Steinmüller on the other. All of the facts, circumstances and allegations demonstrating that the demand which formed the basis of the strike was the same against the three employers; that there was a single dispute between the employees and their union on one hand and the three employers on the other; that the three employers acted in unison in dismissing the members; that the dismissal was based on the same dispute, the same

facts, the same strike, dealing through the same disciplinary process using the same managerial team; that there was a single industrial action involving the members of NUMSA- all of who are employed at the same place; and the employers all took the same decision in the same dispute against employees in the same industrial action, are certainly grounds for holding a single trial but they do not demonstrate that Intervalve and BHR have interest in the dispute between Steinmüller and NUMSA. A judgment against Steinmüller cannot affect Intervalve or BHR. These two companies are for all intents and purposes separate entities, a fact acknowledged by NUMSA. There is nothing to show that a judgment against Steinmüller would be of any consequence to Intervalve or BHR.

[26] Had separate actions been instituted the matters would have been consolidated, though more appropriately a single action is what was required to be instituted. Had NUMSA complied with the provisions of s191(1) to (5) of the LRA and then sought this joinder, it would still have to show good cause as to why it failed to launch the joinder within the time period set out in s191(11)(a).

[27] In the circumstances, the appeal must succeed. As regards costs I am of the view in terms of law and equity that this is a matter where there should be no order as to costs.

[28] In the result I make the following order:

The appeal succeeds with no order as to costs.

The order of the Labour Court is set aside and substituted with the following: *The application is dismissed with no order as to costs*.

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Waglay JP

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Francis AJA

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Dlodlo AJA

APPEARANCES:

FOR THE APPELLANTS:	Adv Anton Myburgh SC
	Instructed by Anton Bakker Inc
FOR THE RESPONDENT:	Adv Paul Kennedy SC and Adv Jason Brickhill
	Instructed by Cheadle Thompson and Haysom Inc