**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

**CASE NO JS 246/2011**

Not reportable

Of interest to other judges

In the matter between:

**NEVILLE WISEMAN DANIELS** Applicant

and

**THE STANDARD BANK OF SOUTH AFRICA LIMITED** First Respondent

**EOH ABANTU (PTY) LTD t/a HIGHVELD PFS** Second Respondent

**Application heard: 23 April 2014**

**Judgment delivered: 24 April 2014**

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**JUDGMENT**

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**VAN NIEKERK J**

Introduction

[1] In September 2010, the applicant was engaged by the second respondent (EOH), a temporary employment service, in terms of what is described as a 'memorandum of agreement – contingency employment'. The agreement required the applicant to provide services to EOH's clients. The applicant's services were placed at the disposal of the first respondent (the bank). On 22 October 2010, EOH advised the applicant that the bank had notified it that the applicant's current contract would be terminated on 31 December 2010.

[2] The applicant referred a dispute to the CCMA. In that part of the referral form 7.11 which requires a referring party to insert details of the other party or parties, the applicant wrote "Standard Bank (SA) / Highveld PFS'. The postal address, telephone and fax numbers and the email address reflected on the form are those of EOH. It is common cause that the referral was never served on the bank, at least not as required by Rule 10 of the rules for the conduct of proceedings in the CCMA. That Rule requires a referring party to deliver a completed LRA 7.11 form. Rule 43 defines 'deliver' to mean 'to serve on other parties and file with the Commission'. Rule 10 further requires a referring party, amongst other things, to attach written proof that the document was served on the other parties to the dispute.

[3] A notice of set down of the conciliation meeting was duly issued. The notice makes no mention of the bank. A conciliation meeting was convened at which the bank was not present, it being unaware of the meeting. On 17 December 2010, the CCMA issued a certificate reflecting that the dispute between the applicant and "Highveld PFS' remained unresolved. On 4 April 2011, the applicant filed a statement of case in this court in which he cited the bank as the first respondent and EOH as the second.

[4] The bank has raised a point in *limine*, contending that this court has jurisdiction to entertain an unfair dismissal claim as between the applicant and the bank. The bank submits that the court has no jurisdiction since the applicant referred a

dispute to the CCMA only as against EOH, and that no dispute between the applicant and the bank has ever been conciliated. The applicant submits that it is sufficient that he referred a dispute to the CCMA timeously in which the bank was cited, and that the dispute that has been referred to this court for adjudication has been the subject of conciliation.

Analysis

[5] Section 191 of the LRA requires that in a dispute about an unfair dismissal, the dismissed employee may refer the dispute to the CCMA, in writing. Section 191 (3) requires the employee to satisfy the CCMA that a copy of the referral has been served on the employer. Section 191 (5) provides that after a certificate has been issued or after the expiry of 30 days following the referral, the employee may refer the dispute to this court. In *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* (2000) 21 *ILJ* 142 (LAC), the Labour Appeal Court held that the wording of s 191 (5) is such that conciliation is a precondition to the referral of a dispute to this court for adjudication. Later decisions by this court held that it was sufficient that 'the dispute' had to be the subject of conciliation; it was of no consequence that a party had not been cited in the referral or took no part in the conciliation meeting – that party could later be joined to the proceedings. (See *Selala & another v Rand Water* (2000) 21 ILJ 2102 (LC) and *Mokoena & others v Motor Component Industry (Pty) Ltd & others* (2005) 26 ILJ 277 (LC)). In *Intervalve & another v National Union of Metalworkers obo its members* (unreported JA 24 /2012, 26 March 2014), the Labour Appeal Court held that *Selala* and *Mokoena* were wrongly decided. In that case, the union had referred a dispute against employer A to conciliation, and then to this court for adjudication. The union then sought to join employers B and C to the proceedings. The court held that in the absence of any conciliation consequent on any referral of a dispute to the CCMA as against B and C, this court had no jurisdiction to adjudicate a dispute between the union and B and C.

[6] To the extent that Mr. Hennig, who appeared for the applicant, sought to persuade me that it was sufficient that the bank in the present instance had been

cited in the referral form and that the applicant's dispute had been conciliated, it seems to me that the proper approach is to determine the purpose of conciliation. Conciliation is more than a formal step in the process of dispute resolution – it is intended to afford the parties to a dispute an opportunity to serious engage with one another, with the assistance of a commissioner, and to seek consensus, in good faith. The emphasis that the LRA places of prior conciliation is a recognition that disputes are best resolved by parties themselves, and that third party intervention is not the preferred option. The bank has been deprived of this opportunity, solely on account of the applicant's failure to serve the referral on it. A purposive interpretation of s 191, one that is consistent with the decisions by the LAC in both *Driveline* and *Intervalve* and the CCMA's rules, is that this court has no jurisdiction in circumstances where a referring party fails to serve a Form 7.11 on another party, and where the latter is consequently denied participation in any conciliation meeting convened subsequent to the referral. For this reason, in my view, the bank's point in *limine* stands to be upheld.

[7] In so far as the applicant relies on the principle of *res judicata* to oppose these proceedings, it is trite that the principle is applicable only in respect of final judgments concerning the same subject matter. The applicant relies on a judgment delivered in this court by Rocher AJ on 6 June 2012, when he granted an order condoning the late referral of the applicant's statement of claim. For that purpose, Rocher AJ was required to take into account, on a *prima facie* basis, the applicant's prospects of success in the main application. He was not called on to make any final judgment, as this court is, on the issue of jurisdiction as between the applicant and the bank. In any event, a ruling made by a tribunal lacking jurisdiction cannot be regarded as *res judicata*.

[8] Of course, the matter will proceed as between the applicant and EOH. I did not understand Mr Pio, who appeared on behalf of EOH, to have any difficulty with that.

[9] In so far as costs are concerned, the court has a broad discretion in terms of s 162 of the Act to make orders for costs according to the requirements of the law

and fairness. The court ordinarily seeks to avoid the creation of a perception that its doors are closed to individual employees on account of their potential liability for costs orders that may be granted when they pursue *bona fide* grievances against their employers. In my view, this case falls into that category and I therefore intend to make no order as to costs.

I make the following order:

1. The first respondent's point in *limine* is upheld.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Representation:

For the Applicant: Mr. Martin Hennig, Martin Hennig Attorneys

For the First respondent: Adv. Nadine Fourie instructed by Bowman Gilfillan

For the Second Respondent: Adv. Paul Pio instructed by Van Der Merwe Attorneys