

SOUTH AFRICA / JUDGMENT

Mabaso v Enicker and Another (J2205/18) [2018] ZALCJHB 337 (18 September 2018)

[2018] ZALCJHB 337**COURT**

Labour Court Johannesburg

BEFORE

Tlhotlhamajje

CASE / FILE NUMBER

J2205/18

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case no: J 2205/18**

In the matter between: THANDIWE ZUKISWA
 MABASO Applicant
 and
 TATUM
 ENICKER First
 Respondent
 EBRAHIM
 BODA Second
 Respondent

Heard: 28 August 2018

Delivered: 18 September 2018

JUDGMENT**TLHOTLHALEMAJE, J.**

- [1] The question that arises with this unopposed application brought in terms of Rule 22 of the Rules of this Court is whether it is permissible for this Court to grant a joinder in circumstances where a party sought to be joined was not a party in the proceedings that led to the granting of an order or judgment.

- [2] The applicant, (Mabaso) seeks an order joining the second respondent (Boda) to proceedings that emanated from an unfair dismissal dispute referred to the Commission for Conciliation Mediation and Arbitration (CCMA). Having referred the dispute to the CCMA, Mabaso had alleged she was dismissed by the first respondent, Ms Tatum Enicker (Enicker) on 17 March 2017 and that the dismissal was substantively and procedurally unfair.
- [3] The dispute was scheduled for an arbitration hearing for 30 June 2017, which Enicker failed to attend. This had resulted in a default award being issued in favour of Mabaso on 11 July 2017. The Commissioner awarded her R18 000 (equivalent to six months' remuneration) as compensation for the unfair dismissal claim.
- [4] On 23 November 2017, Enicker belatedly approached the CCMA seeking to rescind the default arbitration award. Her application for condonation for the late filing of the rescission was dismissed in terms of a ruling issued on 8 January 2018. On 16 January 2018, the default award was certified in terms of section 143 of the LRA, and could thus be enforced as if it were an order of this Court under section 143(1) of the Labour Relations Act (LRA)[1]thus enabling the Sheriff to attach and take into execution Enicker's movable goods at her residence.
- [5] Enicker signed a nulla bona certificate on 7 February 2018 following attempts by the Deputy Sheriff (Johannesburg) to execute. On 12 February 2018, the Deputy Sheriff issued a nulla bona return against the instruction to collect the debt emanating from the default arbitration award. Enicker had informed the Deputy Sheriff that she held no title over any movable property and further that she did not have the financial means to satisfy the debt.
- [6] On 6 February 2018, Boda declared in an affidavit that he was married to Enicker out of community of property, and that all the assets in the family home belonged to him.
- [7] Mabaso then re-referred a dispute citing Boda as the respondent. The matter was heard at the CCMA on 9 March 2018. Boda had raised a point in limine contending that he had never dismissed Mabaso and that the main and only protagonist in dispute was his wife, Enicker. Boda had at those proceedings further contended that Enicker owned two vehicles, had an account with Nedbank, and further that the Sheriff ought to have executed against those movables and her banking account. Mabaso thereafter elected to withdraw the dispute against Boda.
- [8] In submissions on behalf of Mabaso it was contended that Boda ought to be joined as the second respondent on basis that he is the true employer in respect of the erstwhile employment relationship. It was further submitted that Boda has a substantial interest in this proceedings.

- [9] It was further submitted that the respondents have jointly refused to comply with the default arbitration award on grounds that both alleged that Mabaso was employed by the other. In essence, both Boda and Enicker disowned liability and pointed fingers at each other.

The legal position and evaluation:

- [10] This Court is empowered in terms of the provisions of Rule 22 of the Rules of this Court to join any party to the proceedings before it under certain circumstances.[2] Mabaso approached this Court in terms of sub-rule 22(1) of the Rules (which provide for the joinder of any person to the proceedings if in the Court's view, the substantially relief sought by the applicant depends on the determination of substantively the same facts or application of the law) read with sub-rule (2)(a) of the Rules of this Court (which provides for the joinder of any party who in the Court's view has a substantial interest in the subject matter of the proceedings to be joined).
- [11] Central to Mabaso's joinder application is that she performed services (in respect of her employment relations) to the benefit of Boda i.e. she was a child-minder of both Enicker and Boda's child and in the result Boda is jointly and severely liable for the

judgment

debt emanating from the default arbitration award in respect of the unfair dismissal claim. Mabaso further avers that Boda and Enicker shared a home and therefore are parents to the child whom she was caring for. Thus, Boda was jointly her employer in respect of the unfair dismissal claim.

- [12] In *City of Johannesburg and Others v South African Local Authorities Pension Fund and Others*[3], the SCA held the following in respect of the principles to be applied in an application for joinder and the non-joinder of a party:

"As to the relevant principles of law, it has by now become well-established that, in the exercise of its inherent power, a court will refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation, have been joined as parties (see e.g. Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657 and 659; Gordon v Department of Health, KwaZulu-Natal [2008] ZASCA 99; 2008 (6) SA 522 (SCA) para 9). A 'direct and substantial interest' is more than a financial interest in the outcome of the litigation. A test often employed to determine whether a particular interest of a third party is the one or the other, is to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against that party, entitling him or her to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first place (see e.g. Amalgamated Engineering Union at 661; Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & others 2005 (4) SA 212 (SCA) paras 64-66).

- [13] It is apparent then that for an application for a joinder of a party to the proceedings to pass muster, the applicant or the party seeking to be joined must successfully demonstrate that the party sought to be joined has a direct and substantial interest in the outcome of the litigation.[4] Differently put, there must be proceedings initiated which are still pending in which a third party has a direct and substantial interest in the outcome of the proceedings. The purpose of a joinder application would be in the main to give an opportunity to the third party to be heard,[5] in circumstances where the relief sought may substantially affect the interests of a third party.[6]
- [14] What is apparent from the pleadings is that Mabaso seeks to join Boda as a respondent in order to execute an arbitration award already granted in her favour. The claim referred to the CCMA for unfair dismissal was resolved through a default arbitration award on 11 July 2017 against Enicker and further when the Deputy Sheriff returned with nulla bona on 12 February 2018. The proceedings initiated against Boda were withdrawn, and effectively, there are no proceedings pending before any forum.
- [15] The question is thus whether a party which was not party to initial proceedings can be joined as a party purely for the purposes of an enforcement of an order or judgment already granted. A similar question came before this Court in *Wallejee and Another v FCSA Organisation Service (Pty) Ltd and Another*[7]. Molahlehi J had agreed that a judgment or order cannot be enforced against a party that was not cited as a party in the proceedings which led to the granting of the order. The basis of that conclusion, and further placing reliance on *Ngema and Others v Screenex Wire Weaving Manufacturers (Pty) Limited and others*[8] was that a party sought to be cited in those proceedings must have been afforded the opportunity to be heard in relation to its

potential liability to the applicant.

- [16] In this case, Mabaso is in possession of a favourable award which has since been made an order of Court. Attempts to rescind the default award proved to be unsuccessful, and as matters stand, there is no indication that Enicker has taken the matter further. Ordinarily, the default award remains executable and neither Enicker nor Boda have opposed the joinder application. Significantly, there is further no indication that interpleader proceedings have been launched. It further appears that the Deputy Sheriff in the light of the nulla bona return and certificate is at a dead end.
- [17] Both Boda and Enicker appear to have been content to wash their hands off any liability, and their approach is that an affidavit denying liability and a nulla bona certificate should be sufficient, and that the matter or the claim would inevitably go away. I nonetheless do not think so. I appreciate that based on the legal principles alluded to, a joinder or substitution of Enicker is unattainable at this stage of the claim. It is my view however that it would be iniquitous for this court to simply ignore the fact that Mabaso has no other remedy in executing her favourable award. Boda and Enicker in the face of their denial of liability cannot be home and dry. In terms of the provisions of section 158(1)(a)(iii) of the LRA, this

Court is empowered to make any appropriate order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the LRA.

[18] To this end, it is deemed appropriate make the following order;

Order:

1. The second respondent (Mr Ebrahim Boda) Boda is ordered to file an affidavit to show cause why he should not be found to be jointly and severally liable under the execution of a default award granted against the first respondent (Tatum Enicker) in favour of the applicant.
2. The above affidavit is to be filed and served within 21 days from the date of this order, and the applicant is entitled to file an answering affidavit.
3. The first and second respondents are further ordered to appear in Court on 26 October 2018 at 10h00 where the second respondent's affidavit as ordered under orders 1 and 2 would be considered.
4. In the absence or a failure by the second respondent to file an affidavit or failing to appear in court despite being properly served the, Court may make any order it deems appropriate.
5. A copy of this judgment and order must be served personally upon the second respondent (Mr Ebrahim Boda).

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr B. Zwane (Union official of NDCAWU)

For the Respondents: No appearance

[1] Act 66 of 1995 (as amended)

[2] Rule 22 Joinder of parties, intervention as applicant or respondent, amendment of citation and substitution of parties

- (1) The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts. (2)(a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

- (b) When making an order in terms of paragraph (a), the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs.
- (3) Any person entitled to join as a party in any proceedings may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party and the court may make an order, including any order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.
- (4) If a party to any proceedings has been incorrectly or defectively cited, the court may, on application and on notice to the party concerned, correct the error or defect and may make an order as to costs.
- (5) If in any proceedings it becomes necessary to substitute a person for an existing party, any party to such proceedings may, on application and on notice to every other party, apply to the court for an order substituting that party for an existing party and the court may make such order, including an order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.
- (6) An application to join any person as a party to the proceedings or to be substituted for an existing party must be accompanied by copies of all documents previously delivered, unless the person concerned or that person's representative is already in possession of those documents.
- (7) No joinder or substitution in terms of this rule will affect any prior steps taken in the proceedings.
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[3]

[2015] ZASCA 4; (2015) 36 ILJ 1439 (SCA)

[4] See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & others* 2005 (4) SA 212 (SCA)

[5] See *Ex Parte Body Corporate of Caroline Court* 2001

(4) SA 1230 (SCA) at para [9], where it was held that; "...It is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest. In *Amalgamated Engineering Union v Minister of Labour* 1949(3) SA 637 (A) (at 651) the following is stated: 'It was rather a subtle reasoning, which helped the Court to do what it no doubt regarded as substantial justice in the peculiar circumstances of the case, while at the same time enabling it to stand firm on the two essential principles of law that had to be borne in mind, viz.(1) that a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and (2) that the Court should not make an order that may prejudice the rights of parties before it.'

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[6] See Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) at para [21]

[7] (2015) 36 ILJ 1943 (LC)

[8]

(2012) 33 ILJ 681 (LC) at para 22

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