

SOUTH AFRICA / JUDGMENT

Makofane and Others v Tubular Construction Projects (Pty) Ltd; In re: AMCU obo Luthuli and Others v Tubular Construction Projects (Pty) Ltd (JS761/15) [2019] ZALCJHB 364 (27 November 2019) [2019] ZALCJHB 364

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS761/15

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the
labour court of South Africa, johannesburg
Of
interest to other Judges
CASE
NO:JS761/15

In the matter between:	MOTSHABENG SAMUEL MAKOFANE & 9 OTHERS Applicant and TUBULAR CONSTRUCTION PROJECTS(PTY) LTD Respondent IN RE AMCU obo ALBERT LUTHULI & 36 OTHERS Applicant And TUBULAR CONSTRUCTION PROJECTS (PTY) LTD Respondent
Heard:	15 November 2019 Judgment delivered: 27 November 2019

JUDGMENT

VAN NIEKERK J

- [1] This is an application which in terms of prayer 1 of the notice of motion seeks to join Messers. Mkofane, Mashego and Mailula to an action referred to this court on 6 November 2015 in which a number of the respondent's employees dismissed on 18 June 2015 contend that their dismissal by the respondent was unfair. The applicants further seek the amendment of the citation and the substitution of 'some of the other Applicants due to termination of mandate by AMCU and withdrawal of the main applicant Mr. Albert Luthuli from the initial application'.
- [2] It is not in dispute that on 3 July 2015, AMCU, representing Mr. Luthuli and 36 others, all employees dismissed on 18 June 2019, referred a dispute to the MEIBC. On 13 July 2015, the MEIBC issued a certificate recording that the dispute remained unresolved, and that it should be referred to this court for adjudication. A statement of claim was filed on 6 November
2015. Annexed to the statement of claim is a list of 37 employees who are cited as the second to further applicants, all members of AMCU dismissed on 18 June 2015. An amended statement of claim and response were filed during the course of 2016. By the time that the pre-trial conference was held, AMCU appears to have withdrawn as the applicants' representative, and the second to further applicants were represented by five of their number. A pre-trial minute was signed on 10 July 2018, and the matter enrolled for trial on 11 November 2019.
- [3] The present application was filed on 4 October 2019. An answering affidavit was filed 7 November 2019, but no reply had been filed by the trial date. I directed that a replying affidavit be filed by 14 November 2019, and that the application for joinder be argued the next day.
- [4] In his founding affidavit, Mafokane avers that he is one of the employees dismissed by the respondent on the same date as the other applicants, for the same reason. He submits that the court has jurisdiction by virtue of the fact that 'the prerequisite requirement of referring the matter to the CCMA or Bargaining Council was met' and attaches a certificate of outcome issued by the MEIBC on 13 July 2015 stating that a dispute between "AMCU obo A Luthuli & 36 others" remained unresolved on that date. Also attached is a certificate issued by the MEIBC in respect of a dispute between "Mr OT Mashigo" and the respondent, dated 29 September 2015, certifying that a dispute referred on 10 September
- 2015 remained unresolved. Also attached is a third certificate in a dispute between 'Samuel Makofane & 1 other' and the respondent, referred on 4 August 2015, which was certified as unresolved as at 19 August 2019. Mashego and Makofane are applicants in the present proceedings. Mailula referred a dispute to the CCMA. On 31 August 2015 the CCMA issued a

ruling to the effect that it had no jurisdiction to conciliate the dispute, since the nature of the respondent's business was such that it fell within the jurisdiction of the MEIBC. In other words, the three applicants in the present application were not part of the referral made by AMCU on 3 July 2015; they referred separate disputes on 4 August 2015 (Makofane and Mailula) and 10 September 2015 (Mashigo) respectively.

- [5] It also warrants mention that there are confirmatory affidavits attached by a number of individuals, for no apparent purpose. These are Mocumi, Msiza, Maqondo, Makhamele, and Sono. They are all listed in the annexure to the statement of claim and described as members of AMCU, on whose behalf the union filed the claim. There is no reason therefore to join these persons – they are already applicants in the dispute referred to the court for adjudication.
- [6] In so far as the three applicants in the present application are concerned, the respondent does not dispute that they were dismissed along with the applicants to the statement of case on 18 June 2015. It is also not in dispute that they were not applicants in the referral made by AMCU to conciliation, nor are they listed as applicants in the statement of case referred by AMCU on 6 November
2015. Also not in dispute is that despite each of the applicants being in possession of a certificate of outcome recording that their disputes with the respondent remained unresolved (as at 19 August 2015 and 29 September 2015), none of them referred a dispute to this court for adjudication.
- [7] In *NUMSA v Intervale (Pty) Ltd* [2015] 3 BLLR 205 (CC), the Constitutional Court said the following:
- [90] No dispute about the fairness or otherwise of a dismissal arises in a situation where an employer dismisses an employee and that employee does not dispute the fairness of that dismissal but accepts the dismissal and walks away. However, if that employee dispute the fairness of that dismissal and the employer maintains its position that the dismissal is fair, the dispute does arise. This is a clear case of one dismissal dispute or a single dismissal dispute.
- [91] If two employees, Mr Dlamini and Mr Smith, who belong to the same union dismissed by their employer, ABC (Pty) Ltd ("ABC"), after a joint disciplinary hearing whether faced the same allegations of misconduct and one of them accepts the dismissal and walks away at the other disputes the fairness of the dismissal and conveys that to the employer, only one dismissal dispute arises. If, however, they both dispute the fairness of the respect of dismissals, in law to dismissal disputes arise. The one dismissal dispute is between Mr Dlamini and ABC. The other is between Mr Smith and ABC. This is despite the fact that there is much in common between the two dismissal disputes such as that of both employees belong to the same union, were employed by the same employer, faced the same allegations of misconduct like participating in an unprotected strike and share

the same disciplinary enquiry before they were dismissed.

- [92] Mr Dlamini and Mr Smith may refer the respect of dismissal disputes to conciliation jointly by way of a single referral or they may refer the respect of dismissal disputes to conciliation separately into referrals. If Mr Dlamini refers his dismissal dispute to conciliation and Mr Smith does not refer his, Mr Dlamini's dismissal can later be referred to the Labour Court for adjudication in terms of section 191 (5) of the LRA if the dispute remains unresolved after the conciliation process. If Mr Smith wishes his dismissal dispute to also be adjudicated by the Labour Court when he realises that Mr Dlamini's one is about to be adjudicated and Mr Dlamini might get his job back, he would face the hurdle that his dispute was not referred to conciliation. Mr Smith cannot be saved by the argument that his dispute and that of Mr Dlamini's are one and the same dispute and, therefore, the Labour Court should join him in the trial proceedings relating to Mr Dlamini's dismissal dispute.
- [93] The same would apply Mr Smith referred his dispute outside the prescribed 30-day period and condonation was refused and he did not take the decision on review. In order to disputes are separate disputes...
- [94] What I've said above about Mr Dlamini and Mr Smith's dismissal disputes reveals that, despite the fact that Mr Dlamini and Mr Smith belong to the same union, were employed by the same employer, attended the same disciplinary enquiry facing the same allegations of misconduct and were dismissed at the same time for the same reason, if each one of them disputed the fairness of his dismissal, their dismissals would give rise to 2 separate dismissal disputes....
- [8] In *SACCAWU obo members v Entertainment Logistics Service* (a division of Gallo Africa Ltd) [2011] 2 BLLR 206 (LC), this court dismissed an application to join members of a trade union in circumstances where a referral to the court had been made in respect of the dismissal of a single employee. The court noted that the issue raised by the application was whether a party

who has not referred a dispute to the Court for adjudication may apply to join a dispute timeously referred by another party, in

circumstances where the applicant in the joint application claims that the right to relief depends on the determination of substantially the same question of law and facts. The court dismissed the application, with costs, on the basis that an applicant may not avoid the statutory prescribed time limits by resorting to an application for joinder, and that the question of joinder (or the consolidation of a dispute with any other dispute referred to the Court for adjudication) is more appropriately dealt with if and when condonation for the late referral has been granted. The court held that the provisions of s 191 (5) contemplated that where the same factual circumstances gave rise to different disputes, each of the disputes had to be referred to this court by way of the filing of a statement of case. Specifically, an applicant in this court could not rely on joinder in terms of Rule 22 to avoid the obligation to comply with section 191 of the LRA. Section 191 contemplates the referral of a dispute for adjudication, and requires that any dispute that is

referred be referred within the 90-day time limit.

- [10] Although the applicants in the SACCAWU case had been dismissed for related but separate incidents, they had declared separate disputes and processed them separately through the statutory dispute resolution structure. In the present case, the factual circumstances giving rise to the separate disputes are identical, but they remain separate disputes and the principle thus remains intact, i.e. that even where the factual circumstances giving rise to a number of separate disputes are the same, the disputes must be discreetly processed through the statutory dispute resolution system and in particular, must be separately referred to this court for adjudication within the prescribed time limit. Of course, it remains open to the court for reasons of convenience to consolidate disputes in those circumstances, but the mechanism of joinder is not open to a party who has failed to refer a dispute to this court in terms of Rule 6.
- [11] In short: the applicants in the present proceedings are not party to the referral to this court. They referred different disputes to conciliation and obtained different certificates of outcome. For reasons that are not apparent, for some four years, they did nothing to pursue their claims. They now seek to hang onto the coattails of those who referred their dispute timeously to have their claim adjudicated by the court for the reasons recorded above, it is not open to them to do so. The application for joinder stands to be dismissed.
- [12] In so far as the present applicants seek further to have the citation in the pending action amended and to have certain of the applicants in that action substituted by others on account of the termination of AMCU mandate and what appears to be the withdrawal of Mr Luthuli (described as the 'main applicant'), there is simply no basis for such an order. What appears to have transpired since the withdrawal of AMCU and its attorneys from the proceedings is a reluctance by certain of the original applicants to pursue the claim, and the intervention of the attorney of record on behalf of the applicants in the joinder application. These are not matters that can be resolved on the present papers, but which must necessarily be resolved before the matter can be re-enrolled for trial.

I make the following order:

1. The application for joinder is dismissed.
2. Each of the individual applicants listed in annexure A to the statement of case must, within 21 days of the date of this order, file an affidavit confirming that he is an applicant to the referral and that he intends pursuing his claim, as recorded in the statement of case read with the pre-trial minute.
3. Any attorney acting on behalf of any of the individual applicants listed in annexure A to the statement of case may, in lieu of filing the affidavit referred to in paragraph 2, file a power of attorney within the prescribed time limit in which he or she is authorised to act on the applicant's behalf.

4. After the expiry of the 21-day period referred to in paragraph 1, any party to the dispute may approach the Judge President for further direction as to the conduct of this matter, including a request for a trial date.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Mr L M Segaole, Segaole Attorneys

For the respondent: Adv. E Tolmay instructed by Webber Wentzel

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