Reportable
Delivered 31 August 2010

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: JS 585/08

In the matter between:

SOUTH AFRICAN COMMERCIAL CATERING & ALLIED WORKERS UNION obo members **Applicant**

And

ENTERTAINMENT LOGISTICS SERVICE (A DIVISION OF GALLO AFRICA LTD) **Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application brought in terms of rule 22 of the rules of this court in which the applicant seeks to join some 70 of its members (to whom I shall refer as the 'individual employees') to a referral made in respect of the dismissal of a single employee, Ms Philadelphia Mazibu. The crisp issue raised by the application is whether a party who has not referred a dispute to this court for adjudication may apply to join in a dispute timeously referred by another party, in circumstances where the applicant in the joinder application claims that the right to relief depends on the determination of substantially the same question of law or facts.

Factual background

[2] The factual background to the application is a matter of common cause. During February 2008, some of the respondent's employees engaged in two separate incidents of unprotected industrial action. The first resulted in the dismissal of 21 employees; the second in the dismissal of 53 employees, including Mazibu, a shop steward.

[3] The applicant referred three different disputes to the CCMA. The first referral was made on 31 March 2008, in respect of the 21 employees dismissed on 5 March 2008. On 21 April 2008, a conciliation meeting was held, but the dispute could not be settled. The commissioner issued a certificate of outcome to that effect. In terms of s 191 (11) (a), the applicant had until 21 July 2008 to refer the dispute to this court.

[4] On 21 April 2008, the applicant referred a second dispute to the CCMA in respect of 79 employees, being those employees dismissed in both the first and the second incidents of industrial action. Included in this referral were the 21 employees whose dispute had already been referred to the CCMA and in respect of whom a certificate of outcome had been issued. On 26 May 2008, a conciliation meeting was convened in respect of the second dispute. The dispute was not settled, and the commissioner issued a certificate to this effect on 1 July 2008. The applicant therefore had until 1 October 2008 to refer the dispute to this court.

[5] On 8 May 2008, the applicant referred a dispute to the CCMA concerning Mazibu's dismissal. A conciliation meeting was held on 2 June 208, and a certificate of outcome issued reflecting that the dispute could not be resolved. On 2 September 2008, the applicant referred the dispute to this court by filing a

statement of case within the prescribed time limit. The respondent filed its statement of defence on 17 September 2008, and the matter remains pending.

[6] On 14 October 2008, the applicant launched the present application. By this time, any referral of the disputes concerning the dismissal of the individual employees (i.e. those that were the subject of the first and second referrals) was out of time. The purpose of this application is to join the individual employees as parties in Mazibu's case.

The relevant legal principles.

[7] The relevant principles are those that govern the referral of disputes to this court for adjudication, and the provisions of rule 22, which regulates the joinder of parties, intervention in matters before the court, the amendment of citations and the substitution of parties. Section 191 (5) reads as follows:

> *If a …commissioner has certified that 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-*
> *(i)*
> *(ii)*
> *(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or …*

Subsection (11) reads-

> *(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 … commissioner has certified that the dispute remains unresolved.*

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

[8] Rule 22 (1) reads as follows:

> *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.*

The rule does not draw any clear distinctions between joinder of necessity and joinder of convenience. Orders for the consolidation of any separate proceedings pending before the court are contemplated by rule 23.

Analysis

[9] The three acts of dismissal that gave rise to the three disputes referred to the CCMA share a limited factual commonality. The high point for the applicant is that some of the individual employees were dismissed for participation in same unprotected industrial action for which Mazibu was dismissed. Even then, Mazibu and the individual employees dismissed for the same misconduct occupied different positions (Mazibu was a shop steward), and were dismissed after differently constituted disciplinary enquiries (a separate enquiry was convened for Mazibu and other shop stewards). The remaining individual employees, i.e. those not dismissed for participation in the same misconduct as Mazibu) were dismissed at a different time, for participation in a different form of industrial action, i.e. participation in an overtime ban as opposed to a strike. The applicant does not dispute that in these circumstances, the sanction of dismissal imposed in each case may have been influenced by different aspects in respect of each applicant. What is particularly significant for present purposes is that the dismissals gave rise to separate and independent disputes, each of which was

processed separately through the statutory dispute resolution mechanisms. Separate conciliation meetings were held in respect of each, and separate certificates of outcome were issued in respect of each dispute.

[10] In my view, what the structure and wording of s 191 demonstrates, consistent with the manner in which the applicant had processed them, is that in the present instance, separate disputes had to be referred to this court. What the applicant might then have sought after the referral is a joinder or more correctly, a consolidation of the disputes in terms of rule 23. It is not open to the applicant to use the process of joinder to circumvent the provisions of s 191 (5) and (11) in respect of each dispute. These provisions require, in peremptory terms, that each of the disputes had to be referred to this court by way of the filing of a statement of case. Just as a plaintiff in a civil claim in the High Court cannot, through a belated process of joinder, join a defendant against whom a claim has prescribed (see *Waverly Blankets Ltd v Shoprite Checkers (Pty) Ltd & another* 2002 (4) SA 166 (C)), an applicant in this court cannot rely on a joinder in terms of rule 22 to avoid its obligations to comply with s 191of the LRA.

[11] Even if I am wrong in coming to this conclusion, the application stands to fail on the basis that in the present circumstances, condonation is a pre-requisite for joinder. The granting of the application for joinder would have the effect of the individual employees coming party to Mazibu's statement of case with effect from the date of the order, with the result that Mazibu's referral would serve as their referral to this court. Seen thus, the individual applicants cannot escape their obligation to comply with the 90-day time limit in terms of s 191 (11) (a), and their obligation to seek condonation in terms of s 191 (11) (b).

[12] To the extent that the applicant contends that an application for condonation is not required at this stage and that it ought appropriately to be dealt with after a ruling in this application, this contention overlooks the structure

of the dispute resolution process. In effect, the applicant seeks to refer a dispute on behalf of the individual employees outside of the prescribed time limit, and thus requires condonation. It is not sufficient, as the applicants submit, that the individual employees have never denied any necessity for an application for condonation or that such an application will not be forthcoming. It is incumbent on a party to apply for condonation as soon as possible upon becoming aware of the default. This point has been repeatedly emphasised by the Supreme Court of Appeal, (see *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138 H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129 G; and *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671 B – D), an approach strongly endorsed by the Labour Appeal Court. Indeed the LAC has held that an application for condonation ought to be launched on the same day that the default is discovered (see, *inter alia Allround Tooling (Pty) Ltd v NUMSA and others* [1998] 8 BLLR 847 (LAC) at 849, para. 8; *Foster v Stewart Scott Inc* [1997] 2 BLLR 117 (LAC) at 119 F - G; NEHAWU *v Nyembezi* [1999] 5 BLLR 463 (LAC) at 464 D - F; and *Librapac CC v Fedcraw and Others* [1999] 6 BLLR 540 (LAC) at 543). In short: in the absence of the condonation of the late referral of a dispute to this court, an applicant may not avoid the statutorily prescribed time limits by resorting to an application for joinder. The question of joinder (or the consolidation of a dispute with any other dispute validly referred to the court for adjudication) is more appropriately dealt with if and when condonation for the late referral has been granted.

[13] For these reasons, the applicant must fail. Finally, there is no reason why costs should not follow the result, with the caveat that the matter was not one in which the costs of two counsel can be justified.

I accordingly make the following order:

1. The application is dismissed with costs, such costs to include the costs only of one counsel.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application 20 August 2010

Date of judgment 31 August 2010

Appearances:

For the applicant Adv PJ Pretorius SC, with him Adv A Myburgh, instructed by Bowman Gilfillan Inc.

For the respondent Adv K Pillay, instructed by Vuza Biyana & Associates