



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA2/2019

In the matter between:

REVON ADAMS

Appellant

and

NATIONAL BARGAINING COUNCIL FOR THE

FREIGHT AND LOGISTICS INDUSTRY

First Respondent

AE ANDREWS NO

Second Respondent

ABIES TRANSPORT SERVICES CC

Third Respondent

Heard: 25 February 2020

Delivered: 18 May 2020

Coram: Davis, Sutherland JJA and Murphy AJA

JUDGMENT

SUTHERLAND JA

- [1] This is a case about the significance of who signs the prescribed form to refer a dispute to conciliation and then to refer that dispute to arbitration under the auspices

of the Bargaining Council for the Road Freight and Logistics Industry (the Council). The appellant, Adams, the aggrieved dismissed employee, did not personally sign the referral to conciliation or to arbitration; his attorney did so. This formed the ground of a challenge by the employer, Abies Transport Services, the third respondent, to the jurisdiction of the Council. The arbitrator upheld the point and dismissed the application for want of jurisdiction. On review, the Labour Court endorsed the arbitrator's ruling. This appeal, which is not opposed, addresses this sole issue.

[2] The critical common cause facts are these:

- 2.1 Adams was dismissed for misconduct.
- 2.2 A referral to the council to conciliate the alleged unfair dismissal dispute was signed by his attorney.
- 2.3 A conciliation meeting was convened on two occasions. Adams appeared alone in these proceedings. Abies Transport did not appear and conciliation therefore failed. It must be inferred that the time elapse of 30 days kicked in. No protest was noted about the referral to conciliation being signed by a person other than the aggrieved employee.
- 2.4 A referral to arbitration was signed by Adams' attorney.
- 2.5 An arbitration hearing was convened. Adams appeared alone. Abies Transport appeared and raised a point *in limine* that the council had no jurisdiction because rule 6.1 of the Council rules had not been complied with. That rule reads:
 'A document that a party must sign in terms of the Act or these rules must be signed by the party or by a person entitled in terms of the Act or these rules to represent that party in the proceedings.'
 (underlining supplied)
- 2.6 The Ruling of the arbitrator reads:

'The point *in limine* is upheld. The dispute had been referred to the Bargaining Council by a person other than the employee, and such person does not have a right to represent him at the hearing. The referral is procedurally irregular and as a consequence the Bargaining Council does have jurisdiction to hear this matter. The employee is at liberty to refer the matter again, in a procedurally compliant manner, to the Bargaining Council and to argue for condonation should he wish to proceed further with the dispute.'

(underlining supplied)

[3] On review, the judgment of the Labour Court concluded thus:

'[27] In my view, a proper and authorised signature on a referral document must be subject to the same kind of considerations as set out in *[Numsa v Intervale (2015) 36 ILJ 363 (CC)]* relating to service of that very same document. It is significant that it is found in the same part of the Rules dealing with service as well. The actual signature by the party making the referral signals the authorisation of the bringing of the process, and then the participation in the proceedings by such referring party. It is like a proper mandate to sue. There can be no doubt that signatures on such kind of documents have a critical role to play. In *Librapac CC v Moletsane NO and Others* (1998) 19 ILJ 1159 (LC) at para 55, the Court held:

'The applicant has submitted further that, of those 16, only one has signed the referral and that he was therefore the only employee who was properly part of the conciliation and properly part of the subsequent arbitration. There is considerable force in that submission. To have certainty about parties to a dispute resolution mechanism, which begins with conciliation and which may potentially end in the Labour Appeal Court, is a necessary part of the process. It does not impose an overly technical or legalistic obstacle. All that is required is a clear schedule containing each person's full names, his or her address, and a signature to record that person's wish to be party to the steps being taken...'

[28] The signature of a referral document by any person not entitled to do so, is just the same as no signature at all. Such a defective signature, which is for all

intents and purposes invalid, has no legal consequence or significance. It is trite that unsigned pleadings are valid.

[29] This Court has dealt with situations where referral documents have been signed by labour consultants, who would clearly not be entitled to represent parties before the CCMA and bargaining councils. In *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1634 (LC) at paras 19 - 20, the Court held as follows:

‘... In the case of arbitration the same right to be represented applies. In addition, a legal practitioner, as defined may represent the employee. See s 138(4) of the LRA. However, there is no right permitting a legal practitioner to appear before the CCMA when it arbitrates dismissals arising from conduct and capacity. But on application the commissioner may permit a legal practitioner to represent an employee. See s 140(1) of the LRA.

It is clear that a labour consultant, who has no right of audience before a CCMA commissioner, may not sign form LRA7.11 nor form LRA7.13 on behalf of a dismissed employee.’

[30] In *Vac Air Technology (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2006) 27 ILJ 1733 (LC) at para 14, the Court dealt with a situation where a labour consultant signed pleadings in the Labour Court, and said:

‘... papers before the Labour Court signed by a person who does not fall within the permitted category are null and void, and proceedings relating thereto are also null and void.’

The Court concluded:

‘A labour consultant is not permitted to represent parties in terms of the Act. It follows that any affidavits he deposed to or any correspondence he wrote, in the capacity of a labour consultant representing a party, are null and void. The proceedings are also null and void.’

[31] Even though the Court in *Vac Air* was dealing with pleadings under the Labour Court Rules, there is in my view no reason why these same consequences should not equally apply to invalidly signed CCMA or bargaining council referral documents, thus rendering the same null and void. This was recognised in *Danone Southern Africa (Pty) Ltd and Another v Commission for Conciliation, Mediation and Arbitration and Others* [2017] SALCJHB 252 (30 June 2017) at para 39, where the Court held:

‘... Representation in the context of Rule 25 does not just include appearing at the CCMA. It includes all facets of representation, which would include the bringing of legal process such as the filing of applications. A defect in this regard renders the proceedings so brought, to be nothing else but an irregular step.’

The Court then specifically referred to the judgment in *Vac Air* and concluded:

‘Whilst the judgment in *Vac Air* dealt with the Labour Court Rules, I can see no reason why these same considerations should not equally apply to the CCMA Rules.’

[32] In *casu*, it was not hard for the applicant to have simply complied with the Rules. There was no indication or plea on his part that he had some or other difficulty or obstacle causing him to be unable to sign the referral forms. There was no feasible reason for his attorney signing the forms instead of him. All he needed to do was just append his signature to the referral forms. His failure to do so rendered the referrals to conciliation and arbitration invalid, and thus null and void. The consequence of this failure was aptly described in *Oosthuizen v Imperial Logistics CC and Others* (2013) 34 ILJ 683 (LC) at para 14, as follows:

“In a line of decisions starting with *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others*, this court (and following it the CCMA) has found that the failure by the referring party personally to sign a referral to conciliation constitutes a material defect which deprives the CCMA (and a bargaining council) of the jurisdiction to hear the dispute. The personal signature of a referral form is thus a jurisdictional fact which must be established before the CCMA or a bargaining council can exercise its jurisdiction over the dispute.”

- [4] The controversy, as articulated in the appeal, falls into two parts. The first is a textual interpretation of the phrase “entitled to represent”, in which the thrust is that Adams’ attorney was an “entitled representative”. The second is an argument which assumes the irregularity of the attorney’s signature instead of Adams, but upon the authority of *ABC Telesales v Pasmans* [2001] 4 BLLR 385 (LAC), contends that the irregularity can be overcome by the aggrieved employee participating in the subsequent hearing after the referral form is signed.
- [5] As to the interpretation argument, the focus was on the possible meanings to attribute to the term “....entitled to represent....” in order to contrive an “entitlement” for an attorney to be in a class of persons so “entitled to represent” a party. I am not convinced that this is fertile ground, and in the light of the rationale expressed in this judgment, it is unnecessary to traverse the semantics of the phrase which, in its context, seems pretty clear that what is meant is that only the party should affix a signature. A related debate took place at the arbitration on the hypothetical premise that, had Adams made an application to be represented by a lawyer in the arbitration and such application succeeded (ie the attorney would have become “entitled to represent” him), the controversy might have been resolved. In my view, this tack led nowhere. The arbitrator considered the merits of such a hypothetical application to be represented by a lawyer and held, on the facts, that it would have been unsuccessful. However, more importantly, the hypothesis could be relevant only to the odyssey into the mysteries of the phrase “entitled to represent”, which, as alluded to above, it is unnecessary to pursue. The arbitrator’s ruling was premised on the “entitled to represent” notion, and in my view, is not in this regard, to be faulted, as it seems that, at best, an attorney is merely a person in a class of persons “eligible” to become entitled to represent parties before the CCMA or a bargaining council.
- [6] In the debate before the review court and in the appeal hearing, the fresh contention was advanced that the decision of this Court in *ABC Telesales* was authority for the

proposition that, where a party does not personally sign the prescribed form but thereafter appears at the convened proceedings, such conduct amounts to a quasi-ratification which satisfies the need for proof of jurisdiction.

[7] The relevant passages in *ABC Telesales* read:

[4] In terms of section 191(1) of the LRA

“(i)f there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of the dismissal to –

. . .

(b) the Commission. . .”

And section 191(4) directs the CCMA to “attempt to resolve the dispute through conciliation”.

[5] In terms of rule 5.1 of the rules of the CCMA:

“A referral of a dispute for conciliation must comply with regulation 11(2) of the Regulations on LRA Form 7.11 . . . and must be signed by the referring party”.

Regulation 11(2) reads in so far as it is relevant:

“A referral of a dispute to the Commission for conciliation in terms of (section). . . 191(1) . . . by the Commission, must be made in the form of annexure LRA 7”.

It appears that the form concerned was filled in by the firm of attorneys acting on behalf of Pasmans and that an articled clerk in its employ signed the form as the “Party referring the dispute”. This, I am prepared to assume, amounted to non-compliance with rule 5.1. It is quite clear that after the dispute had been referred for conciliation, Pasmans and ABC participated in the conciliation process and, thereafter, both participated in the proceedings before the Commissioner.

[6] The court's duty in interpreting legislation is, of course, always to establish the intention of the lawmaker. There is no difficulty in discerning the intention of the words in rule 5.1 at the stage when Form 7.11 is handed to the CCMA. At that stage the intention is clearly to provide for the CCMA to reject the form by reason of it not having been signed by the referring party. In this way the possibility of an unauthorised referral is avoided. However, the referring party's participation in the conciliation process without objection renders the requirement of her signature redundant at that stage. It follows that the rule-maker could not have intended the rule to apply once such participation had occurred and with it, the ratification of the referral. This approach, it seems to me, gives effect to a purposive interpretation of the rule in accordance with the approach approved of by this Court in *Business South Africa v Congress of South African Trade Unions and another* (1997) 18 ILJ 474 (LAC) at 479A–B and in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)* (1997) 18 ILJ 671 (LAC) at 675G–H.

[7] It follows that with respect the Labour Court in *Rustenburg Platinum Mines Limited (Rustenburg Section) v CCMA and others* [1997] 11 BLLR 1475 (LC) erred in deciding in effect at 1479H–I that a referral which was not signed by the referring party himself remained invalid beyond the stage of conciliation.'

[8] From *ABC Telesales* these important considerations are notable:

8.1 First, the core rationale is the divination of the purpose of the primary injunction that the form must be signed by the 'dismissed employee' – in the phraseology used in the Council's rules - the "party". In accordance with the interpretation of a rule being purposively interpreted, this Court in *ABC Telesales* recognised that the function of the injunction was to eliminate the risk of unauthorised referrals.

8.2 Second, a failure to adhere strictly to this rule does not unsuit an aggrieved party for want of jurisdiction. The conduct of the aggrieved party subsequent to the irregular signature could render 'the requirement of her signature redundant at that stage'. The reference to that stage was to the proceedings

at which the aggrieved party appeared and sought to participate as envisaged by the referral.

- [9] In *ABC Telesales*, of course, there are important factual distinctions from the present case. In *ABC Telesales* the employer had, itself, participated fully in both the conciliation and in the arbitration; in this case the employer did not participate in the conciliation and objected only at the arbitration stage. Thus, the court in *ABC Telesales* did not have to consider the implications of an objection at the latter stage.
- [10] However, in my view, that distinction does not serve to distinguish the decision on the material issue: *post-signature conduct by the aggrieved employee* that achieves the purpose of the rule which is to eliminate the risk of an unauthorised referral. Moreover, no sound policy consideration can exist that, under such circumstances, should impel a court to uphold the absurd result that a party who demonstrates unequivocally that he wants his own dispute addressed is improperly before the tribunal because a formality to eliminate the risk of an unauthorised referral was not complied with in the literal terms of such rule. The appearance of the aggrieved employee in the arbitration proceedings is the foundation of the clear proof that the referral was not unauthorised. The legitimate concern of the Council to avoid assuming a jurisdiction it might not have, is addressed. Seemingly, the decision in *ABC Telesales* was not drawn to the attention of the arbitrator and she was not called upon to consider the ratification argument.
- [11] The judgment in the court *a quo*, rejected the import of *ABC Telesales*. The basis for the rejection was that the ratification dictum could not be good law because it was supposedly a derivative decision based on a dictum in *Fidelity Guards Holdings (Pty) Ltd v Epstein N O* (2000) 21 ILJ 2382 (LAC), a case that was concerned with a late referral. That decision addressed the question of whether the validity of a referral to conciliation could be challenged after a certificate of non-resolution had been issued. In *Epstein* it was held to not be possible to do so because the certificate was a *sine qua non* for jurisdiction to be established. This notion was

addressed tangentially in *SAMWU obo Manentza v Ngwate Local Municipality & others* (2015) 36 ILJ 2581 (LAC). It held that *Epstein* was wrong insofar as a certificate of non-resolution casts a blanket on all that went before. It held further that a breach of a peremptory requirement to refer a dispute within a fixed period could not be overlooked for the purposes of determining jurisdiction. The key criticism of *Epstein* was that it was wrong to hold that jurisdiction was dependant on the issue of a certificate of non-resolution at conciliation. In neither case was the Court called upon to consider a ratification argument.

[12] In my view, the *dicta* in these cases do not conflict with the *ratio* in *ABC Telesales*. The policy considerations about timeous referrals cannot be equated with the utility of a personal signature by the aggrieved party to avoid the risk of an unauthorised referral. A referral out of time cannot be tolerated and requires condonation to achieve the purpose of that rule; a signature on the referral whose sole function is to eliminate the risk of an unauthorised referral is not of the same type of injunction.

[13] In *Oosthuizen v Imperial Logistics CC & others* (2013) 34 ILJ 683 (LC), the Labour Court considered *ABC Telesales*. In *Oosthuizen*, as in *Manentza*, the central controversy was whether a late referral should be condoned. The referral in question was a second referral. The first referral had been rejected by the Bargaining Council because it was not personally signed by the aggrieved employee. The case was decided on the basis that no proper case for a delay of about a year in respect of the second referral had been made out. Some attempt was made in the argument to invoke *ABC Telesales*, but the court rejected the applicability of that authority to the facts of the case because there was no attempt by the aggrieved employee to ratify the first referral. No allusion was made to *ABC Telesales* having been wrongly decided.

[14] A second thesis in the Court *a quo* to distinguish *ABC Telesales*, was to hold that the different facts affected the force of its import. The critical distinction identified is that the employer in *ABC Telesales* participated fully and cried wolf belatedly. By contrast, the employer here, Abies Transport, complained at the outset of the

arbitration proceedings. I am unpersuaded that this distinction is functional to the true controversy: it is not what the employer did, nor when it did so, but rather, what the conduct of the aggrieved employee was that could and did categorically dispel the risk of an unauthorised referral.

- [15] In the result, I am of the view that *ABC Telesales* is sound authority for the appellant's proposition that the purpose of the signature rule was achieved by the ratification of the aggrieved person's agent signing the referral. The fact that it was an attorney who signed it is a non-material fact.

Conclusions

- [16] Although it is highly desirable for good order that rules be complied with on their own terms, the function of the rule is the paramount consideration and, where it can be safely found that the purpose of the rule is achieved, it is highly undesirable to approach the matter in a literalist way. Mechanical thinking is anathema to our law: *cessante ratione legis cessat et ipsa lex*. The objectives of the Labour Relations Act 61 of 1995 inform the context of interpretation and its penumbra of pragmatism. Our law is not an Ass.
- [17] Accordingly, the ruling that there was no jurisdiction ought not to have been made. It ought to have been reviewed. The appeal succeeds.
- [18] The circumstances of the matter do not warrant a costs order being made.

The Order

- (i) The appeal is upheld.
- (ii) The decision of the Labour Court is set aside and replaced with the following:
"The ruling of 5 September 2016 is reviewed and set aside".

Sutherland JA

Davis JA and Murphy AJA concur.

APPEARANCES:

FOR THE APPELLANT: H. Rossouw of Edward Nathan Sonnenbergs.

No appearances for the respondents.