IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 589/15

In the application of a Joinder:

MZIZI FAKUDE **First Applicant**

ALETTAH MANZANA **Second Applicant**

BANTSEBA LOCKIOS MAHLAKWANE **Third Applicant**

ADELA NOKUTHULA SIGASA **Fourth Applicant**

in re

in the matter between:

PUBLIC SERVANTS ASOCIATION OF SOUTH AFRICA **Applicant**

MALULEKA AND OTHERS **Second – Further Applicants**

and

MEC: HEALTH, GAUTENG PROVINCIAL GOVERNMENT **Respondent**

Heard: **18 June 2019**

Delivered: **19 June 2019**

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JUDGMENT – APPLICATION FOR A JOINDER

TLHOTLHALEMAJE, J

Introduction:

[1] These trial proceedings commenced on 18 February 2019 until 01 March 2019 when the matter was part-heard. Pending the resumption of proceedings, the first to fourth applicants had on 7 May 2019, launched separate applications to be joined as applicants and be afforded an opportunity to present oral evidence in the hearing. The applicants' pleadings refer to an application to i*nterven*e. Obviously in the light of the relief they seek, an application for intervention is an irregular step. Be that as it may, and for the sake of expedience, the applications would be determined on the basis that what in fact the applicants seek is leave to join the proceedings, rather than to intervene. The respondent opposed the applications.

[2] The nub of the dispute in the main proceedings is that;

2.1 The individual applicants held various positions in the respondent's Emergency Medical Services unit and were based at various sites throughout Gauteng Province. Their services were terminated on 4 November 2014 on allegations of having participated in an unprotected strike action.

2.2 An alleged unfair dismissal dispute was referred to the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) on 24 January 2015 by the PSA acting on their behalf. A certificate of outcome was issued on 22 February 2015.

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2.3 The applicants' statement of claim was filed and served on 12 August 2015. The list of the individual applicants as annexed to the statement of claim does not include the four individual applicants who seek to be joined in these proceedings, hence this interlocutory application.

[3] The trial proceedings were adjourned at a stage where the respondent had closed its case after several of its witnesses had testified, and also where several of the individual applicants had testified.

[4] In seeking a joinder, the applicants' versions and cases as to the reason they seek the order are to a large extent similar. In a nutshell, they were all employed by the respondent like the other individual applicants before the Court in various positions and at various sites. They were also dismissed on 4 November 2014 notwithstanding the fact that Manzana was only notified of her dismissal on 12 November 2014.

[5] The central theme in the founding affidavits is that the four individuals were, or believed that they were members of the PSA at all material times until their dismissal. They further believed that they were party to the proceedings instituted at the PHSDSBC and further in this Court by the PSA on behalf of the other individuals.

[6] It was only in January and February 2019 that it was brought to their attention that in fact they were not party to the proceedings before the Court. Enquiries made with the PSA as to the reason that they were not a party to the proceedings revealed ultimately that according to PSA, they were not its members or members in good standing.

[7] In seeking to be joined to the proceedings at this belated and advanced stage of the proceedings, the applicants contend that they have an interest in the proceedings in view of the fact that they were dismissed under the same set of circumstances as the individual applicants before the Court; that it would be in the interests of justice that they be joined, as their disputes would be determined once and for all in respect of all those involved, rather than the court having to hear individual cases emanating from the same facts in

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separate proceedings. They also contend that they will be prejudiced should their application be denied, as they remained unemployed and are not in a position to individually launch proceedings against the respondent. They further averred that they had prospects of succeeding in the current proceedings, and that the respondent would not be prejudiced should the applications be granted.

[8] In opposing the application, the respondent through an answering affidavit deposed to by its Assistant Director in Labour Relations, Gerald Papo, averred that the applications ought to be dismissed on the grounds that;

a) The order sought in these proceedings by the other applicants before the Court will not directly affect the rights and interests of those seeking to be joined as no evidence was led by the respondent concerning their participation in the strike;

b) The application to join was belated as the applicants were aware as far as January 2019 that they were not party to the proceedings and had not timeously approached the Court.

c) Evidence has already been adduced by the respondent, which has already closed its case, and the joinder posed inherent risks to the fairness of the trial if it was granted

d) The respondent will be prejudiced by the granting of the joinder, as it will then have to re-open its case and call the same witnesses to be cross-examined twice on issues already dealt with.

[9] 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.[1] In terms of sub-rule 22(1) of the Rules, the Court may join a

[1] 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.

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party to proceedings if in its view, the substantial relief sought by the applicant depends on the determination of substantively the same facts or application of the law.

[10] Equally so under the provisions of sub-rule (2)(a) of the Rules of this Court, a joinder is permissible if in the Court's view, that party has a substantial interest in the subject matter of the proceedings.

[11] In *City of Johannesburg and Others v South African Local Authorities Pension Fund and Others*[2], 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

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(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.

[2] [2015] ZASCA 4; (2015) 36 ILJ 1439 (SCA)

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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).

[12] It is apparent 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 it has a direct and substantial interest in the outcome of the litigation.[3] 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,[4] in circumstances where the relief sought may substantially affect the interests of a third party.[5]

[13] In regard to joinder, it was stated in *Snyders and Others v De Jager (Joinder)*[6] that;

> 'A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interests. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an

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

[4] 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:
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> > '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.'

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

[6] (CCT186/15) [2016] ZACC 54; 2017 (5) BCLR 604 (CC) (21 December 2016) at para 9

opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.'

[14] In this case, it was common cause that the dismissal of the individual applicants seeking to be joined took place under the same set of circumstances as that of the individuals in the main proceedings. From an approach of common sense, convenience, the interests of expedition and administration of justice, it would make sense to allow the joinder even at this belated stage of the proceedings. However, the facts and circumstances of this case, and the determination of the current applications are not merely dependent on what is convenient, as central to the determination of any dispute before this Court is the issue of jurisdiction.

[15] It is trite that in accordance with the provisions of section 191(1) of the Labour Relations Act (LRA)[7], a dismissed employee must refer a dispute to the CCMA or relevant Bargaining Council within certain time frames. Upon a certificate of outcome having been issued, in accordance with the provisions of section 191(5)(b)(iii) of the LRA, the dispute may then be referred to this Court for adjudication.

[16] Under the provisions of section 157(4) of the LRA, this Court "may refuse to determine any dispute" if the Court is not satisfied "that an attempt has been made to resolve the dispute through conciliation"

[17] The starting point is that from the founding affidavits, it is apparent that the PSA has denied that the individual applicants seeking to be joined were its members. This therefore implies that when the dispute was initially referred to the PHSDSBC by the PSA, the individual applicants could not have been

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[7] Act 66 of 1995 (as amended), section **191. Disputes about unfair dismissals and unfair labour practices**

(1)

(a) If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to -

(i) a *council*, if the parties to the *dispute* fall within the registered *scope* of that *council*; or

(ii) the Commission, if no *council* has jurisdiction.

party to that dispute. In any event, it was neither argued nor demonstrated on their behalf that they were indeed party to the referral and the conciliation proceedings, the implications of which are that the jurisdictional requirement under section 191(1)(a) of the LRA was not satisfied.

[18] The approach of our courts has been that a party may not be joined to proceedings if it was not a party to the conciliation process.[8] In *Temba Big Save CC,* it was reiterated that a referral for conciliation is indispensable and a precondition to Commissioner's or the Labour Court's jurisdiction over unfair dismissal disputes, which means that if a party is not part of the conciliation proceedings it cannot be joined at a later stage.[9]

[19] In this case, in the light of the jurisdictional prerequisites not having been met, there is no basis in law why the application for a joinder should be granted. In any event, inasmuch as it is appreciated with these applications that the applicants seeking to be joined have a substantial interest in the matter, the question that was answered by the respondent is that the order that will ultimately be made in the main proceedings will not directly affect their rights and interests, as no evidence was led insofar as their own personal circumstances leading to their dismissal are concerned.

[20] It is further not correct as they have suggested that the respondent would not be prejudiced. The trial proceedings are indeed at an advanced stage with the respondent having closed its case. To the extent that they further sought an order to allow them to present oral evidence, this would clearly necessitate a recall of witnesses who have already been cross-examined, and thus further protracting these proceedings, which have already gone over ten days. Furthermore, it is not as if the individual applicants will now find themselves without a remedy if a joinder is not granted. They are still at liberty to approach the PHSDSBC.

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[8] See *Temba Big Save CC v Kunyuza and Others* [2016] ZALAC 36; [2016] 10 BLLR 1016 (LAC); (2016) 37 (ILJ) 2633 (LAC); *Ngema and Others v Screenex Wire Weaving Manufacturers (Pty) Limited and others* (2012) 33 ILJ 681 (LC) at para 22 ; *National Union of Mineworkers of South Africa v Intervalve (Pty) Ltd and Others* [2015] 2 BCLR 182 (CC).
[9] *Supra* fn (8) At para 29; See also *National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd and Others* at paras 40 and 108

[21] In the circumstances, the following order is made;

Order:

1. The application for a joinder is dismissed.
2. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants (Joinder): A. R. S Nxumalo, instructed by Thabang Ntshebe Attorneys (Pro Bono)

For the Respondent: M. W Dlamini, instructed by the State Attorney, Johannesburg

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