



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Case No: JS 524/24

In the matter between:

**MOTOR INDUSTRY STAFF ASSOCIATION**

**First Applicant**

**BONGANI SHADRACK NKOSI**

**Second Applicant**

and

**KAPICO SOUTH AFRICA (PTY) LTD**

**Respondent**

**Heard: 25 February 2025**

**Delivered: 08 December 2025**

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**JUDGMENT**

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**MILO, AJ**

- [1] This judgment concerns points *in limine* advanced by the respondent in answer to the applicants' action arising from the second applicant's alleged unfair retrenchment. The preliminary points, if upheld, would dispose of the matter without the need for this Court to determine the merits of the alleged unfair retrenchment.

[2] The points *in limine* raised by the respondent may be summarised as follows. It is contended by the respondent that:

2.1 the applicants impermissibly referred two separate disputes to the Dispute Resolution Centre of the Motor Industry Bargaining Council (DRC) in respect of the same cause of action, namely the alleged unfair retrenchment of the second applicant; and

2.2 in respect of the dispute pursued in this action, no conciliation has taken place.

[3] On account of these averments, the respondent contends that the applicants' claim is fatally defective and that this Court lacks jurisdiction to entertain it.

#### The relevant facts

[4] The parties concluded a pre-trial minute in which they recorded several facts as common cause. For present purposes, the facts relevant to the determination of the respondent's points *in limine* are common cause or uncontentious and include the following:

4.1 The second applicant was at all material times relevant to this action, employed by the respondent, namely Kapico South Africa (Pty) Limited.

4.2 Indeed, it was the respondent who issued a notice contemplated by section 189(3) of the Labour Relations Act<sup>1</sup> (LRA) to, amongst others, the second applicant. The respondent held consultations with the second applicant, and it was the respondent who ultimately retrenched the second applicant on or about 30 April 2024.

4.3 Pursuant to the retrenchment of the second applicant by the respondent, on or about 22 May 2024, the applicants referred an unfair dismissal dispute to the DRC (the First Referral). In the First Referral, the applicants cited the employer party as *Kapico Holdings SA (Pty) Limited*.

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<sup>1</sup> Act 66 of 1995, as amended.

- 4.4 Kapico Holdings SA (Pty) Limited is the holding company of the respondent (the Holding Company). The Holding Company is a separate legal entity from the respondent, each entity bearing a different company registration number.
- 4.5 On or about 26 June 2024, the DRC issued a certificate of non-resolution of the dispute of the First Referral. The applicants have taken no further steps in respect of the First Referral.
- 4.6 Thereafter, and on or about 24 July 2024, the applicants referred a fresh dispute to the DRC in respect of the second applicant's alleged unfair retrenchment (the Second Referral). In the Second Referral, the employer party was cited as *Kapico South Africa (Pty) Limited*, namely the respondent in this action.
- 4.7 The Second Referral was not referred to the DRC timeously, and the applicants sought condonation from the DRC for the late delivery of the Second Referral.
- 4.8 On 27 August 2024, the DRC issued a ruling to the parties in terms of which the late delivery of the Second Referral was condoned. In this condonation ruling (which was placed before this Court by the respondent), the Commissioner stated as follows:
- 'I am satisfied that the Applicant has shown good cause for the delay in referring the current matter [i.e. the Second Referral] to the DRC. It is clear that initial referral [i.e. the First Referral] was made against the incorrect employer and this would amount to a new referral. The submissions made by Mr Govender, to the effect that the applicant cannot refer the same dispute again is misplaced.'
- 4.9 The respondent has not sought to review this condonation ruling.
- 4.10 Also on 27 August 2024, the DRC issued a certificate of non-resolution in respect of the Second Referral.

- 4.11 Thereafter, and within the 90-day period permitted to deliver a statement of claim to pursue an action in this Court, the applicants delivered their statement of claim against the respondent pursuant to the Second Referral.

### Evaluation

- [5] Against this factual background, I turn to consider the two issues raised *in limine*. Although related, each rests on a distinct legal contention and is addressed separately below.

### The existence of two referrals

- [6] While it is correct that the applicants delivered two referrals to the DRC, only one of those referrals concerned a dispute against the present respondent. It is that dispute, captured in the Second Referral and certified as unresolved, that forms the basis of the applicants' statement of case. The applicants, therefore, pursue a single dismissal dispute against the respondent.
- [7] In argument, the respondent submitted that:
- 7.1 The Second Referral was null and void.
- 7.2 The Commissioner was *functus officio* when seized with the Second Referral;
- 7.3 The matter was *lis alibi pendens* by virtue of the First Referral, such that only the First Referral could competently be referred to this Court.
- [8] These submissions were advanced on the argument that the employer cited in both referrals is "the same party" and that the applicants ought instead to have corrected the First Referral rather than deliver a new referral against the respondent.
- [9] The respondent's assertions are misplaced for several reasons.

- [10] The starting point is the respondent's reliance on *lis alibi pendens*. It is trite that this defence is available only where there is litigation pending; the other proceedings are pending between the same parties; the pending proceedings are based on the same cause of action; and the pending proceedings concern the same subject matter.<sup>2</sup>
- [11] A key requirement, therefore, is that the prior and present proceedings must involve the same parties. It is presumably for this reason that the respondent now asserts, belatedly, vaguely and incorrectly, that the employer cited in both referrals is "the same party". This contention was not pleaded, is raised for the first time in argument, and is directly contradicted by the parties' own pre-trial minute, in which they record that the Holding Company is a separate juristic entity bearing a different registration number and is, in fact, the holding company of the respondent.
- [12] It is trite that a holding company remains a separate juristic person from its subsidiaries.<sup>3</sup> Each entity bears its own legal personality, rights and obligations.
- [13] The Labour Appeal Court and the Constitutional Court have made it clear that even where companies form part of the same group, share services, operate from the same premises, or even act "with a single voice", they remain distinct juristic persons whose legal identities cannot be conflated for procedural convenience.<sup>4</sup> (I should point out that *in casu* no such case was pleaded or advanced on the papers in this matter. The parties in fact agreed, in their pre-trial minute, that the Holding Company and the respondent are separate entities).
- [14] A referral of an unfair dismissal dispute against the correct employer is a jurisdictional prerequisite under the LRA. The First Referral was therefore a

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<sup>2</sup> *Feni v Commission for Conciliation, Mediation and Arbitration & others* (2020) 41 ILJ 1899 (LAC) at paras 15 to 17.

<sup>3</sup> See, for example, *Avis Southern Africa (Pty) Limited and Others versus Porteous and Another* 2024 (2) SA 386 (GJ) at para 74.

<sup>4</sup> *National Union of Metalworkers of South Africa v Intervale (Pty) Ltd and others* 2015 (2) BCLR 182 (CC).

nullity vis-à-vis the respondent. The only referral capable of grounding this Court's jurisdiction as against the respondent is the Second Referral, in respect of which condonation was granted and a certificate of non-resolution issued.

- [15] *In casu*, once it became apparent that the initial referral had been made against an entity that was not the employer, the applicants acted prudently and correctly in not initiating an action based on that referral, but by instead delivering the Second Referral against the proper party.
- [16] The argument that one should treat the Holding Company and the respondent as "the same employer" is therefore entirely inconsistent with binding authority and the parties' own common-cause position.
- [17] Returning to the *lis alibi pendens* argument, the First Referral was directed at the Holding Company. The present proceedings, by contrast, concern a different juristic person altogether, namely the respondent. The parties to the two proceedings are therefore not the same. This alone is fatal to any reliance on *lis alibi pendens*, which requires the same parties as a foundational element.
- [18] The respondent placed considerable reliance on this Court's judgment in *Democratised Transport Logistics & Allied Workers Union on behalf of Tshwili v Bidvest Services (Pty) Ltd t/a Bidvest Prestige Cleaning Services*<sup>5</sup> (*Bidvest*). That reliance is misplaced.
- [19] *Bidvest* concerned a very different scenario. It concerned two jurisdictional rulings issued under the auspices of the CCMA in respect of the same dispute between the same parties. That judgment addressed whether the doctrines of *functus officio* and *res judicata* prevented a second commissioner from making a contrary jurisdictional ruling. In the present matter, by contrast, the First Referral was issued against an entirely different juristic person, namely the respondent's holding company. The First Referral could not, in law, create a pending dispute between the applicants and the respondent, nor could it give

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<sup>5</sup> (2023) 44 ILJ 2727 (LC).

rise to any finality binding upon the present respondent. Neither *functus officio* nor *res judicata* can arise as against the respondent where the earlier proceedings were directed against another party who was not the employer and was not the alleged wrongdoer.

[20] Properly understood, *Bidvest* offers no support for the respondent's contentions. If anything, the principles articulated in that judgment emphasise the point that jurisdictional finality attaches only to rulings concerning the same parties to the dispute.

[21] For all these reasons, this contention must be dismissed.

#### The conciliation contention

[22] It is difficult to discern a cognisable basis upon which this complaint has been raised. The respondent does not dispute that the Second Referral was made against the correct employer, and it acknowledges that a certificate of non-resolution was duly issued.

[23] The respondent's complaint appears instead to rest on the assertion that the earlier First Referral somehow taints or nullifies the subsequent process. Nothing in the LRA supports such a proposition.

[24] Section 191(5)(b) of the LRA provides that, once a bargaining council or the CCMA has certified that a dismissal dispute remains unresolved (or once the prescribed time period has expired), the employee may refer the dispute to this Court for adjudication if it is alleged that the dismissal was for operational requirements.

[25] The common cause facts outlined above confirm unequivocally that the applicants have complied with each of these jurisdictional requirements in respect of the Second Referral.

[26] The First Referral against a different juristic person does not undermine or invalidate this statutory sequence.

[27] Furthermore, nothing in section 191 requires an employee to persist with a referral directed at an entity that, it subsequently emerges, is not the respondent against whom the employee seeks relief. The statutory scheme is permissive. After a dispute has been referred to the CCMA or bargaining council and a certificate of non-resolution is issued (or the requisite time period elapses), the employee *may* refer the dismissal dispute to this Court. It may also choose not to do so.

[28] The First Referral was simply not a viable vehicle for pursuing the dispute against the present respondent, and the applicants were entitled to abandon it. Having correctly delivered the Second Referral, sought and obtained condonation for its late delivery, and then timeously pursued that dispute in this Court, the jurisdictional pathway in section 191(5)(b) was properly and fully invoked.

[29] In these circumstances, this contention is likewise without merit and falls to be dismissed.

#### Costs

[30] The applicants urged this Court to depart from the general approach that costs do not ordinarily follow the result in labour matters. They submitted that the respondent's points *in limine* were so lacking in merit as to be frivolous, that they were raised with the effect of delaying the expeditious determination of the dispute, and that this Court ought to mark its displeasure by way of a costs order.

[31] Section 162 of the LRA empowers this Court to make an order for the payment of costs according to the requirements of the law and fairness, and in doing so to take into account, among other factors, the conduct of the parties in proceeding with or defending the matter.

[32] The respondent's argument on *lis alibi pendens* was ultimately unsustainable. It was inconsistent with the common cause facts and contradicted by the pre-trial



minute. The accompanying point relating to conciliation similarly lacked merit. Although these objections were unsuccessful, I am not persuaded that they rise to the level of frivolousness or malice in the sense required to justify a departure from the ordinary approach to costs.

[33] That said, the raising of technical points that lack a factual foundation does little to advance the statutory purpose of the expeditious and effective resolution of dismissal disputes, and in some instances may unnecessarily burden this Court's limited resources. Parties are reminded that the LRA encourages a substantive ventilation of employment disputes rather than the multiplication of technical skirmishes.

[34] Balancing all the considerations of law and fairness in terms of section 162, I am not persuaded that a costs order is warranted in this case. No order as to costs will therefore be made.

[35] In the circumstances, the following order is made:

Order

1. The respondent's point *in limine* is dismissed.
2. There is no order as to costs.

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S. Milo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants : Dr Gerrie Ebersohn – Gerrie Ebersohn Attorneys

For the Respondent: Ms Lenette Pillay – Yusuf Nagdee Attorneys

LABOUR COURT