

REPORTABLE

**In the Labour Courts of South Africa
Held at Johannesburg**

Case Number: J358/99

30 JUNE 2000

In the matter between:-

Applicants

and

Respondent

JUDGMENT 17 July 2000

PILLAY AJ

1. This is an application for the joinder of the South African Municipal Workers Union (SAMWU) and Dr Kasan as the 3rd applicant and 2nd respondent respectively.
2. In the main application the applicants challenged the appointment of Dr Kasan to the position of General Manager: Scientific Services.
3. The applicants were members of SAMWU. They submitted that Dr Kasan and SAMWU had a direct and substantial interest in the outcome of the dispute.

4. Although SAMWU had been informed of the dispute being referred to the CCMA prior to conciliation, nothing was done to join SAMWU then. Nor did SAMWU itself apply to be joined.
5. The Applicants aver that it now became clear that matters such as racism, affirmative action and unequal wages paid to the applicants are matters that also affect other employees. Furthermore, they had raised questions ranging from whether or not the affirmative action policy is an agreement strictly between the respondent and the stakeholders who participated in its formation. The trial therefore, it was submitted, would “to some extent interpret the meaning and reach of affirmative action”.
6. The legal officer of SAMWU was concerned that the matter would have a serious impact not only on the parties before court but also on other members generally who were not party to the proceedings.
7. The respondent resisted the application firstly on the ground that the applicants had failed to comply with the Labour Relations Act, 66 of 1995 (LRA) in that Dr Kasan and SAMWU were not parties at the conciliation of the dispute. The respondent also relied on its objections raised *in limine* in its statement of defence.
8. The court has a discretion to join a person as a party to these proceedings even if such person was not joined at the time of conciliation.
9. The parties were at odds with each other as to whether there was agreement that the court should consider the joinder application simultaneously with the points *in limine*. Whether there was agreement or not is not material as the court finds that it would have to rule on this interlocutory application only after analysing the primary dispute. Such analysis would necessitate

consideration of some of the points *in limine*.

10. The dispute that was referred to conciliation was framed thus:

“The appointment and subsequent approval by the Board of Rand Water of an external candidate to the position of General Manager: Scientific Services disregarding recommendations, regulations, laws, etc on the recruitment and selection of internal Black candidates who qualify for the post”

11. The applicants had also alleged in the referral that :

“Rand Water's leadership has now deliberately resorted to victimisation by denying us the senior post of General Manager: Scientific Services even though we qualify.”

12. The court has not seen the certificate (Form 7.12) and therefore is not aware as to how the conciliating commissioner classified the dispute.

13. Nevertheless, the dispute that the applicants referred to the court as recorded in their amended statement of case related in essence to the failure to promote them and to advertise the post internally first before advertising it externally. The failure to advertise internally first amounted - so it was alleged – to unfair discrimination on the grounds of “colour, race and/or political beliefs”; alternatively; by “victimising and/or marginalising” (*sic*) the applicants.

14. Whether the failure to promote the applicants amounts to an unfair labour practice falls outside the jurisdiction of this court. Such a dispute must be arbitrated in terms of Item 2(1)(b) of part B of

Schedule 7 of the LRA.

15. Disputes about discrimination may be referred to the Labour Court. The narrow issue for determination by this court therefore is whether the failure to advertise internally first amounted to unfair discrimination based on colour, race or political beliefs. It must be established that not only did the respondent fail to apply its “recommendations, regulations, laws, etc on recruitment and selection” (*sic*) but that such failure amounted to discrimination based on colour, race or political beliefs. The applicants have therefore brought the dispute within the jurisdiction of the court on that limited basis.

16. In so far as the applicants contend that the respondent's failure to comply with its policy document was an unfair labour practice, it would fall outside the jurisdiction of the court and must be arbitrated as a dispute in terms of Item 2(1)(b).

17. The applicants may also not prosecute a general complaint about black staff not being paid the same salaries as whites. They have no mandate to launch such a class action. Furthermore, that was not the dispute that was conciliated. SAMWU cannot be joined in order that a party to these proceedings may claim *locus standi* so as to justify a general and class based relief.

18. Rule 22 of the Rules of the Labour Court provide for the joinder of parties as applicant or respondent as follows :

(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.” (my emphasis)

19. SAMWU would have a general interest in disputes concerning any of its members. Likewise, it would also have a general interest in any dispute in which a collective agreement to which it is a party, would be relied on as the source of the rights being enforced. It would have a direct and substantial interest in a dispute in which the very issue for determination is the interpretation and application of a collective agreement. That is not the dispute before this court. It cannot be since such disputes must be arbitrated in terms of section 24 of the LRA.

20. Even if the interpretation and application relates to a document that is not a collective agreement, SAMWU can still not be joined as that is not the cause of action in this dispute.

21. SAMWU cannot claim any relief for itself as a party on the limited basis on which the dispute is before this court. Nothing prevents SAMWU from furthering its members' interests by participating in the proceedings as representatives of the applicants.

22. The position with Dr Kasan is different. He has a substantial interest in the outcome of the matter as the relief claimed includes the setting aside of his appointment. However, he has elected to abide by the decision of the court in the main application. Consequently, there is no need to make any order in regard to Dr Kasan.

23. The application for joinder of SAMWU as the third applicant is dismissed with costs.

PILLAY AJ

30 June 2000

17 July 2000

For Applicant : Adv T Motau

Instructed by : Tshiqi Attorneys

For Respondent : Adv T C Tiedemann

Instructed by : Petersen Hertog & Associates